TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~955~~ 446

THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, APPELLANT,

vs.

IRVING L. ERNST, LINDSAY RUSSELL, AND HARFORD T. MARSHALL, AS TRUSTEES IN BANKRUPTCY OF DUDLEY P. HUMPHREY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 1, 1913.

(23,530)

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SUPREME COURT OF THE UNITED STATES.

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vs.

IRVING L. ERNST, LINDSAY RUSSELL, AND HARFORD T. MARSHALL, AS TRUSTEES IN BANKRUPTCY OF DUDLEY P. HUMPHREY, ET AL.

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District Court of the United States, 1

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST and others, as Trustees of Dudley T. Humphrey *et als.*,
Plaintiffs-Appellees,

AGAINST

THE MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant-Appellant. 2

Stipulation as to Record on Appeal.

IT IS HEREBY STIPULATED AND AGREED that the record on appeal to the United States Circuit Court of Appeals for the Second Circuit taken by The Mechanics & Metals National Bank of The City of New York as appellant, from the decree entered on the 9th day of January, 1912, in the above-entitled cause, shall consist of the following papers and proceedings, the printing of other papers composing the balance of said record in said cause being hereby waived: 3

1. This stipulation,

2. Statement of docket entries,

4 3. Subpœna.

4. Bill of complaint,

5. Answer, together with Exhibit A attached thereto,

6. Replication,

7. Order of reference,

8. Stenographer's minutes,

together with the following exhibits offered in evidence, which shall be printed in full.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 5[A], 6, 7, 8, 9,
5 10, 17, 30, 31, 32 and 33; and Defendant's Exhibits A, A[1], B, C, D, E, F, G, H, I, J and K.

9. Report of Charles F. Brown, Esq., Special Master,

10. Notice of motion confirming report,

11. Defendant's exceptions to Special Master's report,

12. Opinion of Hand, *J.*, in suit of Henry D. Hotchkiss, &c., *v.* National City Bank,

13. Opinion of Hand, *J.*, granting motion to confirm Master's report.

6 14. Decree entered January 9, 1912.

15. Petition for allowance of the appeal of appellants.

16. Undertaking on appeal.

17. Assignment of errors.

18. Citation on appeal.

It is further stipulated, without prejudice to the exceptions noted by the defendant at the time the same were offered, the Plaintiffs' Exhibits 11 for Identification, 12 for Identification, 13 for Identifi-

cation, 14 for Identification, 15 for Identification 7
and 16 for Identification, and Plaintiffs' Exhibits 18, 20, 21, 22, 24, 25, 28 and 29 being certain of the books of J. M. Fiske & Co. shall not be printed, but shall be produced before the Court as physical exhibits and may be referred to by the Court and Counsel for either party in their discretion.

It is further stipulated, without prejudice as aforesaid, that Plaintiffs' Exhibits 19, 23, 26 and 27 shall not be printed in full but that such portions thereof as counsel shall deem proper and as shall be incorporated into the printed record shall be and become a part of the printed record on ap- 8
peal, without prejudice to the production of the whole of said exhibits as physical exhibits.

It is further stipulated and agreed that Plaintiffs' Exhibits 1, 2, 3, 4, 5, 5^A, 6, 7, 8, 10, 17, 30, 31, 32 and 33, and Defendant's Exhibits A, A^1, C, D, E, F, G, H, I, J and K, which were transcribed as they were offered in the stenographer's minutes, as well as the portions of Plaintiffs' Exhibits 23, 26 and 27, which shall be printed as a part of this record pursuant to this stipulation, shall be printed in a separate paper book to be known as Exhibit Book, which shall be taken to be and shall be and 9
become a part of the record on appeal, and shall be certified as such.

Dated New York, March 30th, 1912.

Hays, Hershfield & Wolf,
Attorneys for Plaintiffs'-Appellees.

Joline, Larkin & Rathbone,
Attorneys for Defendant-Appellant.

So ordered.

E. H. Lacombe,
U. S. C. J.

LEARNED HAND
U. S. D. J.

10 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST *et als.* as Trustees in Bankruptcy of Josiah M. Fiske *et als.*, etc.,
Complainants-Appellees.

AGAINST

11 THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant-Appellant,

Statement.

1910.

June 3. Bill filed. Subpœna issued.
June 3. Subpœna with return of Marshal of service filed.
12 July 5. Defendant entered appearance.
August 11. Answer filed.
Sept. 2. Replication filed.
Oct. 21. Order of reference to Charles F. Brown, Esq., as Special Master, entered.

1911.

Oct. 11. Special Master's report filed.
Nov. 25. Exceptions of defendant to Special Master's report filed.
Dec. 30. Opinion of Hon. Learned Hand confirming Special Master's report filed.

1912. 13

Jan. 9. Decree entered.

Feb. 1. Defendant's petition for Appeal and

1. Allowance of Appeal and Bond filed.

1. Assignment of Errors filed.

Subpœna.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
TO MECHANICS & METALS NATIONAL BANK,
GREETING:

You are hereby commanded that you personally 14
appear before the Judge of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit in Equity, on the first Tuesday of July, A. D. 1910, wheresoever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Irving L. Ernst, Lindsay Russell & Harford T. Marshall, as Trustees in Bankruptcy of Dudley P. Humphrey *et al.*, and to do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of TWO HUNDRED AND FIFTY DOLLARS.

WITNESS, Honorable GEORGE B. ADAMS, GEORGE 15
C. HOLT, CHARLES M. HOUGH and LEARNED HAND, Judges of the District Court of the United States for the Southern District of New York, at the City of New York, on the 3rd day of June in the year one thousand nine hundred and ten and of the Independence of the United States of America, the one hundred and thirty-fourth.

THOMAS ALEXANDER,
Clerk.

HAYS, HERSHFIELD & WOLF,
Complainants' Solicitors.

16 The *defendant* is required to enter appearance in the above cause in the Clerk's office of this Court on or before the first Tuesday of July, 1910, or the bill will be taken *pro confesso* against it.

THOMAS ALEXANDER,
Clerk.

Endorsed: "U. S. District Court S. D. of N. Y. Filed June 3 1910."

Bill of Complaint.

DISTRICT COURT OF THE UNITED STATES,

17 FOR THE SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, individually, and composing the firm of J. M. FISKE & Co. and the firm of J. M. FISKE & Co.,
Complainants,

18

AGAINST

MECHANICS & METALS NATIONAL BANK,
Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK:

Come Irving L. Ernst, Lindsay Russell and Harford T. Marshall, as Trustees in Bankruptcy of the

estate of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as copartners composing the firm of J. M. Fiske & Co., and the firm of J. M. Fiske & Co., residing in the City of New York, Borough of Manhattan, in the District aforesaid, and for this their cause of complaint against the defendant, complain and allege: 19

I.—Upon information and belief that at all of the times hereinafter mentioned, and prior to January 20th, 1910, the defendant was a corporation duly created by, and existing under and by virtue of, the laws of the United States, and thereafter duly caused its corporate name to be changed to "Mechanics' & Metals National Bank," the defendant herein. 20

II.—That at all of the times hereinafter mentioned, Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood were copartners in business in the City of New York, under the firm name and style of "J. M. Fiske & Co."

III.—That heretofore, and on the 19th day of January, 1910, three certain creditors of said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as copartners composing the firm of J. M. Fiske & Co., and of said firm of J. M. Fiske & Co., duly filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, an involuntary petition in bankruptcy, in pursuance of an Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, and the amendments thereof and thereto, praying that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sher- 21

22 wood, individually, and as copartners aforesaid, and said firm, be adjudged bankrupts within the purview of said Act.

IV.—That thereafter, and on the 12th day of March, 1910, the prayer of said petitioning creditors was duly granted, and an order of adjudication was duly entered in said bankruptcy proceedings by Hon. George C. Holt, one of the Justices of the District Court of the United States for the Southern District of New York, adjudging that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, indi-
23 vidually, and as copartners composing the said firm of J. M. Fiske & Co., and said firm of J. M. Fiske & Co. were bankrupts.

V.—That thereafter said proceedings in bankruptcy were duly referred to Hon. Seaman Miller, one of the Referees in Bankruptcy of the District Court of the United States for the Southern District of New York, and in pursuance of such order of reference, and on or about the 5th day of May, 1910, a first meeting of creditors of said bankrupts was duly held as provided by said Act of Congress relating to bankruptcy, at which said meeting the complainants herein were duly appointed and
24 elected the trustees of the estate in bankruptcy of said bankrupts.

VI.—That thereafter the appointment of complainants as such trustees, was duly approved, and the bond of said trustees in the penal sum of $50,000, conditioned upon the faithful performance of their duties as such trustees, was duly filed and thereafter duly approved both as to form and sufficiency, and an order approving such bond was duly filed, and complainants have ever since been, and still are, acting as the trustees in bankruptcy of the said bankrupts.

VII.—That by virtue of the order of their appointment and their qualification as such trustees, and the provisions of the Act of Congress relating to bankruptcy, the complainants herein, as trustees, have become vested with all the property of the said bankrupts of whatever kind, nature, character, or description, as of the date that the said bankrupts were adjudicated bankrupts, to wit, March 12th, 1910, and became vested with all rights of action which creditors of said bankrupts had at the time of the said adjudication in bankruptcy, to avoid all transfers by said bankrupts made, and to recover property so transferred, or its value, and to recover property or its value, transferred by said bankrupts in fraud of their creditors, and all property or its value, transferred by the said bankrupts within four months prior to the filing of the petition against them, or after the filing of the petition, or before adjudication, if the nature of such transfer was to enable any of the creditors of said bankrupts to obtain a greater percentage of their debts than any other creditors of the same class, and the person or persons receiving it or to be benefited thereby, or his or their agents acting therein, had reasonable cause to believe that the said transfer was intended to give a preference under the said Bankruptcy Act.

VIII.—Upon information and belief, that on January 19th, 1910, the defendant claimed to be and was an unsecured creditor of the bankrupts in the sum of about $500,000, which said indebtedness continued until the filing of the petition in bankruptcy herein.

IX.—Upon information and belief, that on January 19th, 1910, and for a long time prior thereto, the said bankrupts were insolvent, and the aggregate of their property, exclusive as well as inclu-

sive of any property which they may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to hinder, delay and defraud their creditors, was not, at a fair valuation, sufficient in amount to pay their debts in full, and while so insolvent, and on and January 19th, 1910, transferred and delivered to the defendant, as alleged payment on the said prior antecedent unsecured indebtedness, certain property consisting of cash, stocks, bonds, notes, checks and securities, amounting to and of the value of, in the aggregate, the sum of about $150,000.

X. Upon information and belief, that on January 19, 1910, and for some time prior thereto, the aggregate of the property of the said bankrupts, exclusive of any and all property which they may have conveyed, transferred or removed, or permitted to be concealed or removed, with intent to hinder, delay and defraud their creditors, was less than, at a fair valuation, the sum of $200,000., and that at said times the unsecured debts of the said bankrupts exceeded the sum of $1,000,000.

XI. Upon information and belief, that on January, 19, 1910, the defendant or its agents acting for it in the said transactions hereinbefore set forth, knew and had reasonable cause to believe that the bankrupts were insolvent, and received the said transfer and delivery of the said moneys, stocks, bonds, notes, checks and securities of the value of about $150,000. aforesaid, so made to it as aforesaid by the bankrupts in order to enable itself, the said defendant, to receive a greater percentage on its alleged debt than any other creditors of the same class, and that by reason of the said transfer of said moneys, stocks, bonds, notes, checks and securities of the said value or sum of

about $150,000. so made to it as aforesaid, the 31
defendant did obtain a greater percentage of its alleged debt than any other creditor of the same class, and the defendant or its agent or agents acting for it, knew and had reasonable cause to believe that it was intended thereby to give a preference to said defendant and a preference to said defendant was thereby given.

XII.—Upon information and belief, that on January 19, 1910, and for a long time prior thereto, the said bankrupts were insolvent as aforesaid, and while so insolvent, to their knowledge, with the intent on their part to hinder, delay and defraud 32
their creditors and the complainants herein, did transfer and deliver to the defendant said property consisting of cash, stocks, bonds, notes, checks and securities, amounting to and of the value of about $150,000. as aforesaid. That the defendant was not a purchaser or recipient thereof in good faith, for the reason that the said defendant knew and had reasonable cause to believe that the said bankrupts were insolvent as aforesaid, and were by the said transfer and delivery of said cash, stocks, bonds, notes, checks and securities, divesting themselves of a large portion of their assets and transferring the same to the defendant herein.

33

XIII.—That the said transfer and delivery of said cash, stocks, bonds, notes, checks and securities as aforesaid, was fraudulent and void as against the creditors of the said bankrupts and the complainants herein.

In tender consideration whereof, and for as much as the complainants are remediless in the premises by the strict rules of the common law, and cannot have adequate relief save in a Court of Equity where matters of this and a similar nature are properly cognizable and relievable,

34 YOUR COMPLAINANT PRAY:

1. That the said transfers and deliveries of said cash, stocks, bonds, notes, checks and securities, amounting to and of the value of about $450,000 as aforesaid, be declared fraudulent and void, and be set aside as preferential, fraudulent and void within the purview of the Act of Congress relating to bankruptcy; and

2. That the said defendant be directed to account to the complainants herein for the said cash, stocks, bonds, notes, checks and securities, and the value thereof, and to pay same to the complainants herein, and the complainants herein further pray that they may have such other and further relief as in the premises the nature of their case shall require, and shall be agreeable to equity and good conscience.

May it please your Honors to grant unto the complainants herein a writ of subpœna of the United States of America, directed to the defendant, Mechanics' & Metals National Bank, and to such others as shall in the discretion of your Honors appear necessary to the hearing and determination of this case, commanding them on a 36 day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as the Court shall deem proper and required by the principles of equity and good conscience.

HAYS, HERSHFIELD & WOLF,
Solicitors for Complainant,
Office and Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK, }
Southern District of New York, } ss.: 37

IRVING L. ERNST, being duly sworn, says: That he is one of the complainants herein; that he has read the foreging bill of complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

IRVING L. ERNST.

Sworn to before me this
24th day of May, 1910.
ROSE C. KEEGAN,
[SEAL] Notary Public, 38
N. Y. Co., No. 80.

Endorsed: "U. S. District Court S. D. of N. Y. Filed June 3, 1910."

39

40 **Answer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARTFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and
41 ARTHUR C. SHERWOOD, individually and composing the firm of J. M. Fiske & Company and the firm of J. M. Fiske & Company,

Complainants,

AGAINST

MECHANICS & METAL NATIONAL BANK,

Defendant.

42 The answer of the defendant, The Mechanics & Metals National Bank of the City of New York, sued herein as the Mechanics & Metal National Bank, to the bill of complaint of the complainant herein, respectfully shows to the Court and alleges as follows:

This defendant now and at all the times hereinafter mentioned, saving and reserving to itself all and all manner of exception or otherwise that can or may be advanced or taken to the many and manifold errors, uncertainties and imperfections in said bill of complaint contained, for answer thereto or

to so much thereof as this defendant is advised it 43
is material or necessary for it to make answer unto, answering says:

FIRST:—The defendant admits the allegations in the paragraph designated I in said bill of complaint contained, except that it denies that it duly changed its corporate name to "Mechanics & Metals National Bank," and alleges that its corporate name was duly changed to "The Mechanics & Metals National Bank of the City of New York."

SECOND:—The defendant has no personal knowledge of the allegations contained in the paragraph designated II in said bill of complaint, but for the 44
purposes of this suit it admits, upon information and belief, each and every of said allegations as set forth.

THIRD:—This defendant alleges that it is a stranger to all and singular the matters and things in the paragraphs designated III, IV, V, VI, and VII in said bill of complaint contained, and therefore leaves the complainants to make such proof as they shall be able to produce as to each and every of the allegations in said paragraphs and each of them contained.

45

FOURTH:—This defendant denies each and every of the allegations in the paragraph designated VIII in said bill of complaint contained, and alleges that heretofore, and on or about the 8th day of November, 1901, The Mechanics' National Bank of the City of New York, by which name this defendant was known prior to the 29th day of January, 1910, entered into a certain contract with the said firm of J. M. Fiske & Co., a copy of which is hereto annexed and marked "Exhibit A," and made a part of this answer, reference being made thereto as though the same were set out herein in full, and

46 leave being prayed to produce the original thereof upon the trial of this suit; and that thereafter and after the making, execution and delivery of said contract by the said firm of J. M. Fiske & Co. to the said The Mechanics' National Bank of the City of New York, said The Mechanics' National Bank of the City of New York and this defendant, the successor of said The Mechanics' National Bank of the City of New York, in accordance with the terms thereof, and subject to all the terms and conditions thereof, advanced to the said firm of J. M. Fiske & Co. divers large sums of money, upon collateral deposited with it under the terms of said
47 agreement, and that as a result of said transactions, at the opening of business on the 19th day of January, 1910, the said firm of J. M. Fiske & Co. was justly indebted to this defendant thereunder in the sum of $855,000, against which indebtedness and as security for the payment of which, and in accordance with the terms of said agreement and its rights thereunder, this defendant held certain cash, checks, stocks, bonds and other securities of the approximate aggregate market value at that time of $98,439.47; and it further alleges that at the time of the filing of the petition in bankruptcy, as alleged in said bill of complaint herein, the said
48 firm of J. M. Fiske & Co. was justly indebted to this defendant, under the terms of this agreement, in the sum of $260,962, against which said indebtedness and as security for the payment of which, and in accordance with its rights under said agreement, this defendant held certain cash, checks, stocks, bonds and other securities of the approximate aggregate market value at that time of $229,495 as aforesaid.

FIFTH:—Answering the allegations of the paragraphs designated IX and X in said bill of complaint contained, this defendant alleges that it is

a stranger to all and singular the matters and 49
things in said paragraphs contained, and therefore leaves the complainants to make such proof thereof as they shall be able to produce; except that this defendant admits that on the 19th day of January, 1910, it received certain cash, stocks, bonds, notes, checks and securities from the said firm of J. M. Fiske & Co., but denies that the said cash, stocks, bonds, notes, checks and securities so received amounted to and were of the value in the aggregate of about $150,000, and alleges that said cash, stocks, bonds, notes, checks and securities received as aforesaid from the said firm of J. M. Fiske & Co. on the 19th day of January, 1910, 50
were received by it under the terms of said agreement referred to in the paragraph designated as Fourth in this answer, and in accordance with the terms and conditions thereof, as security for advances made by it to the said firm of J. M. Fiske & Co.

SIXTH:—This defendant denies each and every of the allegations in the paragraph designated XI in said bill of complaint contained, and denies that at the time of the receipt of the said securities by it on the 19th day of January, 1910, this defendant knew or had any reasonable cause to believe that 51
it was intended by the transfer thereof to this defendant to give to this defendant a preference; but on the contrary this defendant avers that said advance and the receipt of said securities as collateral security therefor were a part of a continuous transaction under said loan agreement of November 8, 1901, and that the creditors of the said firm of J. M. Fiske & Co. were fully cognizant of the general usage which governed a transaction of such a nature, and were in no wise injured by said transaction, because for the purpose of continuing their business in the usual manner the said firm of J. M.

52 Fiske & Co. received from this defendant the full equivalent of the said securities, so that the fund available to other creditors was in no manner depleted, but was as a matter of fact augmented, as a result of said transaction with this defendant, and creditors other than the defendant received substantial benefits therefrom.

SEVENTH:—Answering the allegations in the paragraph designated XII in said bill of complaint contained, this defendant alleges that it is a stranger to all and singular the matters and things in said paragraph contained, and therefore leaves
53 the complainants to make such proof thereof as they are able to produce, except that it admits that on or about the 19th day of January, 1910, it received certain cash, stocks, bonds, notes, checks and securities from the said firm of J. M. Fiske & Co., and it denies that such cash, stocks, bonds, notes, checks and securities so received amounted to an aggregate in value of about $150,000, and it denies that it was not a recipient thereof in good faith, and it denies that it knew or had reasonable cause to believe that the said J. M. Fiske & Co. were insolvent at the time of said receipt of said securities by it as aforesaid, and alleges that said ad-
54 vances and the receipt of the said securities as collateral security therefor were a part of a continuous transaction under the said loan agreement of November 8, 1901, and that the other creditors of the said firm of J. M. Fiske & Co. were fully cognizant of the general usage which governed a transaction of such a nature, and were in no wise injured by said transaction, because for the purpose of continuing their business in the usual manner the said firm of J. M. Fiske & Co. received from this defendant a full equivalent of the said securities, so that the fund available to other creditors was in no manner depleted, but was as a matter of

fact augmented as a result of the said transaction with this defendant, and that creditors other than the defendant received the benefits thereof. 55

EIGHTH:—This defendant denies each and every allegation in the paragraph designated XIII in said bill of complaint contained.

NINTH:—Further answering the said bill of complaint of the complainant herein, this defendant alleges that heretofore, and on or about the 8th. day of November, 1901, The Mechanics' National Bank of the City of New York, by which name this defendant was known prior to the 29th day of January, 1910, entered into a certain contract with said firm of J. M. Fiske & Co., a copy of which is hereto annexed and marked "Exhibit A" and made a part of this answer, reference being made thereto as though the same were set out herein in full, leave being prayed to produce the original thereof upon the trial of this suit, and that thereafter, and after the making, execution and delivery of said contract by said firm of J. M. Fiske & Co. to said The Mechanics' National Bank of the City of New York, said The Mechanics' National Bank of the City of New York and this defendant, as its successor, in accordance with the terms thereof, and subject to all the terms and conditions thereof, advanced to the said firm of J. M. Fiske & Co. divers large sums of money upon collateral deposited with it under the terms of said agreement, and that as a result of said transactions, at the opening of business on the 19th. day of January, 1910, the said firm of J. M. Fiske & Co. was justly indebted to this defendant thereunder in the sum of $55,000, against which indebtedness and as security for the payment of which, and in accordance with the terms of said agreement and its rights thereunder, this defendant held certain cash, checks, stocks, bonds, notes and 56 57

58 securities of the approximate aggregate market value at that time of $98,439.47, and that at the time of the filing of the petition in bankruptcy as alleged in the said bill of complaint herein, the said firm of J. M. Fiske & Co. was justly indebted to this defendant under the terms of said agreement in the sum of $260,962, against which and as security for the payment of which, in accordance with its rights under said agreement, this defendant held certain cash, checks, stocks, bonds and other securities of the approximate aggregate market value at that time of $239,495.

59 TENTH:—Further answering the bill of complaint, this defendant alleges that at all the times therein specified, and a long time prior thereto, the said firm of J. M. Fiske & Co., was engaged in business as stock brokers in the city, county and State of New York, and that Clifford M. Washburn, one of the members of said firm, was a member of the New York Stock Exchange, and that on the 19th day of January, 1910, the said firm of J. M. Fiske & Co. applied to this defendant for an advance under its aforesaid agreement with this defendant dated the 8th day of November, 1901, to meet its current obligations, and to enable it to
60 perform its existing contracts for the receipt of and payment for all stocks, bonds and other securities for which it was obligated to pay on that date, and for the delivery of such stocks, bonds and other securities deliverable on that date which were pledged as security for loans and advances previously obtained with other brokers and at other banks, and that if the said firm had been unable to obtain such an advance it would have been totally unable to perform its existing contracts and to meet its current obligations as such stock brokers, and their valuable assets would have been greatly impaired, if not destroyed. It further al-

leges that it was understood and agreed between 61
the defendant and the said firm, at the time of the making of said advance at or about the opening of business on the 19th. day of January, 1910, and in accordance with the terms of said agreement bearing date the 8th. day of November, 1901, and in accordance with the general usage which had long prevailed in the transaction of such business between the defendant and the said firm, and between banks and banking institutions in the city of New York and brokers members of the New York Stock Exchange, a usage which was well known to all persons doing business with said firm and the members thereof, including its and their existing 62
creditors, that advances thus made should either be paid off at various times throughout the day during which said advances were made, out of the proceeds of securities which were deliverable by the borrowers on said day, or in the event of the payment of said advances not being made in full by the close of business on said day, the remainder of said advance should be secured by the deposit by the borrower, before the close of business on the same day, of securities obtained by the said firm with the proceeds of said advance or advances. It further alleges that the checks, stocks, bonds and other securities referred to in said bill of com- 63
plaint as having been received by this defendant were delivered to this defendant by said firm of J. M. Fiske & Co. pursuant to said general usage, understanding and agreement, and pursuant to the agreement bearing date the 8th. day of November, 1901, before the close of business on the 19th. day of January, 1910; and it alleges, upon information and belief that said delivery was made before the filing of the aforesaid petition in bankruptcy against the said firm, as alleged in said bill of complaint, and that the existing assets of said firm in possession of the complainants, as trustees in bank-

64 ruptcy, exclusive of the said checks, stocks, bonds and other securities which were delivered to this defendant on the 19th. day of January, 1910, are greater in value than they would have been if the defendant had not made the said advances to said firm of J. M. Fiske & Co. and received the said securities as security therefor.

WHEREFORE this defendant having fully answered, confessed, traversed or denied all the matters in said bill of complaint contained material to be answered, according to its best knowledge and belief, submits to this honorable Court that all and every the matters in complainants' bill
65 mentioned are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief in a court of equity, and humbly prays this honorable Court to enter its decree that this defendant be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable Court shall seem meet and in accordance with equity.

New York, August 10th, 1910.

JOLINE, LARKIN & RATHBONE,
66 Solicitors for Defendant.
ADRIAN H. LARKIN,
Of Counsel.

STATE OF NEW YORK, }
County of New York, } ss.:

GATES W. MCGARRAH, being duly sworn, deposes and says that he is an officer, to wit, the President, of The Mechanics & Metals National Bank of the City of New York, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as

to the matters therein stated to be alleged on in- 67
formation and belief, and that as to those matters he believes it to be true.

The reason that this verification is made by deponent and not by the defendant is that the defendant is a corporation, and not capable of making the same.

GATES W. McGARRAH.

Sworn to before me this 10th day of August, 1910.

FRANCIS L. MADDEN,
Notary Public, Westchester Co., N. Y.
Certificate filed in New York County.
[SEAL.]

68

Exhibit A Attached to Answer.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain, directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or in 69
any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:

1.—All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other

liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2.—Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3.—Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisemtat, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such lia-

bilities together with interest and expenses of sale, 73
holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and 74
and all future as well as to existing transactions between the undersigned and said Bank.

Sgd. J. M. FISKE & Co.

Dated, New York, the 8th day of November, 1901.

Endorsed: "U. S. District Court S. D. of N. Y. Aug. 11, 1910."

76

Replication.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Josiah M. Fiske, Dudley P. Humphrey, Clifford
77 M. Washburn and Arthur C. Sherwood, individually, and composing the firm of J. M. Fiske & Co., and the firm of J. M. FISKE & CO.,

Complainants,

AGAINST

MECHANICS & METALS NATIONAL BANK,

Defendant.

78

These repliants, saving and reserving for themselves, all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto, saith: That they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law, to be replied to by these repliants; without that, that any other matter or thing in the said

answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed. 79

HAYS, HERSHFIELD & WOLF,
Solicitors for Complainants,
No. 115 Broadway,
Borough of Manhattan,
New York City.

RALPH WOLF,
of Counsel. 80

Endorsed: "U. S. District Court S. D. of N. Y. Filed Sep. 2, 1910."

81

82 **Order of Reference.**

At a stated term of the United States District Court, held in and for the Southern District of New York, at the Court Rooms thereof in the Post Office Building, in the Borough of Manhattan, City of New York, on the 20th day of October, 1910.

Present—Hon. GEORGE C. HOLT, *District Judge.*

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83 IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Josiah M. Fiske, Clifford M. Washburn, Dudley T. Humphrey and Arthur C. Sherwood, individually and composing the firm of J. M. Fiske & Co.,

Plaintiffs,

AGAINST

84 MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Defendant.

This case being at issue and having duly come on for trial, and defendant having thereupon moved to refer the same to a special master for hearing, testimony and report, it is

ORDERED that the said motion be and it hereby is granted, and that this cause be and the same

hereby is referred to Charles F. Brown, Esq., as 85
Special Master, for hearing, testimony and report, upon the following terms and conditions agreed to by defendant in open court, to wit:

The expense of said reference, including stenographer's charges, shall be paid by defendant, and shall not be taxable as a cost or disbursement herein; and the said reference is to proceed as expediately as possible and from day to day except for good cause otherwise shown.

GEORGE E. HOLT,
D. J.

We hereby consent to the entry of the above 86
order.

New York, October 20, 1910.

HAYS, HERSHFIELD & WOLF,
Solicitors for Complainants.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant.

Endorsed: "United States District Court, S. D. of N. Y. Filed Oct. 21, 1910."

87

88 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST *et als.*, as Trustees in Bankruptcy, J. M. FISKE & COMPANY *et al.*

AGAINST

THE MECHANICS & METALS
89 NATIONAL BANK OF THE CITY OF NEW YORK.

NEW YORK, 31 October, 1910.

Before—Hon. CHARLES F. BROWN, Referee.

APPEARANCES:

Messrs. HAYS, HERSHFIELD & WOLF (Mr. Hays and Mr. Wolf of counsel), for the plaintiffs;

Messrs. JOLINE, LARKIN & RATHBONE (Mr.
90 Larkin, Mr. Garretson and Mr. Freedman of counsel), for the defendant.

The oath of the Referee is waived.

It is stipulated between counsel that the testimony shall be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be a taxable disbursement.

It is admitted that on the 19th day of January, 1910, the defendant was a corporation duly organized and existing under the name of The Mechanics National Bank of the City of New York, and that thereafter the name was changed to The Mechanics & Metals National Bank of the City of New York.

It is admitted that at all of the times hereinafter mentioned, Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, were copartners in business in the City of New York, under the firm name and style of J. M. Fiske & Company. 91

It is admitted that the third allegation of the complaint is true, subject to proof as to the hour of the day when the petition was filed.

The fourth allegation of the complaint is admitted.

The fifth allegation of the complaint is admitted.

The sixth allegation of the complaint is admitted.

It is conceded that all the bankruptcy records are present, before the Court, and any party can refer to them, or put in copies of them. 92

Adjourned till Wednesday, 2 November, 1910, at two P. M.

NEW YORK, 2 November, 1910.

Met pursuant to adjournment, with the same appearances as before.

Counsel for Complainant: I offer in evidence certified copy of the order of adjudication in Bankruptcy.

Counsel for Defendant: I object as irrelevant, immaterial and incompetent and not binding on the defendant. 93

Objection overruled.

Defendant excepts.

The paper is marked Plaintiffs' Exhibit 1 of November 2, 1910, AS.

[Printed herein at p. 375.]

Counsel for Complainant: I offer in evidence certified copy of the order approving the Trustees' bond.

Same objection, ruling and exception.

It is marked Plaintiffs' Exhibit 2 of November 2, 1910, A. S.

[Printed herein at p. 378.]

94 DUDLEY T. HUMPHREY, being duly sworn and examined as a witness for the complainants, testifies:

By Mr. Wolf:

Q. What is your residence? A. Englewood, New Jersey.

Q. Were you a member of the firm of J. M. Fiske & Company? A. Yes.

Q. Who were the members of that firm? A. Josiah M. Fiske, Arthur C. Sherwood, Clifford M. Washburn and myself.

Q. In what business were J. M. Fiske & Company
95 engaged? A. As bankers and brokers.

Q. Members of the New York Stock Exchange? A. Members of the New York Stock Exchange.

By the Referee:

Q. What was your relation to them? A. I was a member.

By Mr. Wolf:

Q. Who was the floor member, the Exchange member? A. C. M. Washburn.

Q. What were Mr. Fiske's duties in the firm? A.
96 In the customers' office, looking after the customers that came in.

Q. What were Mr. Sherwood's duties? A. He was practically the same, with some overseeing of the books.

Q. What were your duties? A. I had charge of the books.

Q. And also acted as cashier? A. Yes.

Q. You were the member of the firm that had immediate charge and supervision of the books? A. Yes.

Q. Were those books correctly kept? A. Yes.

Q. Entries made in them from day to day as they occurred? A. Yes. 97

Q. Of what did the books consist? A. Ledgers, stock blotters, check books, money loan books, stock loan books, purchase and sales books, long and short books; that is about all.

Q. Do you recall on the 19th. of January, 1910, a petition in bankruptcy was filed against the firm of Fiske & Company? A. Yes.

Q. Do you recall the fact that on that day J. M. Fiske & Company suspended? A. Yes.

Q. Can you state what the assets and liabilities of J. M. Fiske & Company were at any particular time on the 19th of January, 1910? 98

Counsel for Defendant: I object as not the best evidence.

The Referee: If he knows he may answer.

Defendant excepts.

A. No, I couldn't give that.

Q. Can you tell what the assets and liabilities of the firm of J. M. Fiske & Company were at 12 o'clock of January 19th, 1910?

Same objection, ruling and exception.

A. No, I can't tell without reference to the books. 99

Q. Can you tell by reference to the books? A. Well, I might be able to.

Q. It could be computed from the books? A. Yes.

Q. Were the firm of J. M. Fiske & Company, prior to the 19th of January, 1910, interested for their own account in any particular stock, and if so, what stock? A. In the Hocking Coal & Iron pool.

Q. Were they members of that pool? A. Yes.

Q. How many pools of Hocking Coal & Iron

100 stock were there that were in existence on the 19th of January, 1910? A. Two.

Q. Were J. M. Fiske & Company members of both pools? A. Yes.

Q. What was their interest in the first pool?

Defendant's Counsel: I object as not the best evidence; the agreement probably will cover their relations to it.

The Referee: If it is a matter of writing I suppose he will have to produce the papers.

Q. Were J. M. Fiske & Company owners prior to,
101 and on, the 19th of January, 1910, of large holdings of stock in the Columbus & Hocking Coal & Iron Company? A. It depends on what you call large holdings: they had quite a good deal of stock.

Q. Can you tell approximately how many shares they held of that stock on the 19th of January, 1910? A. No, I can't tell just the number of shares, without reference to the books.

Q. Can you tell approximately? A. No, I couldn't tell.

Q. The books will show the holdings of stock of that Company on that day? A. Yes, I have forgotten what it was.

102 Q. As I understand it you testified that the books of J. M. Fiske & Company were correctly kept? A. Yes.

CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT:

By Mr. Larkin:

Q. How do you know there were pool agreements, Hocking Coal & Iron Company pool agreements? A. I have seen the agreements.

Q. Do you know where they are? A. No, I don't.

Q. Where did you see them? A. I saw them over at the office.

Q. In whose possession? A. I think they were 103
in Mr. Sherwood's possession at the time.

Q. Did you read them over? A. I looked them over, not very carefully; I saw that they were agreements.

Q. Did you read them over carefully enough to know what your obligation was under them? A. Why, no; except that I had a general idea.

Q. Did you understand from them that you had some interest in stock under them? A. Yes.

Q. But the extent you didn't gather? A. Not the extent, no.

Q. How long have you been in business in Wall 104
Street? A. About 10 years.

Q. How long have you been connected with this firm? A. For about 5 years.

Q. How long as a partner? A. A year and a half.

Q. Prior to that your duties were what? A. Cashier.

Q. Were you cashier when you started with the firm? A. Yes.

Q. What was your previous experience in the Street? A. As a bookkeeper for Henderson, Lindley & Company, another stock exchange house.

Q. How long had you been bookkeeper there? 105
A. About 3 years.

Q. When you joined the firm of J. M. Fiske & Company, who were then members of the firm? A. Mr. Fiske and Mr. Sherwood.

Q. When did Mr. Washburn come in? A. He came in, I think it was in November, 1908; somewhere around there.

Q. Since you have been in Wall Street, how long have you known of the existence of such a firm as J. M. Fiske & Company? A. Oh, 7 or 8 years.

106 Q. Did you keep these books yourself? A. I kept part of them.

Q. Well, which ones? A. I kept the check book and one of the blotters.

Q. Which one? A. The cash blotter.

Q. You kept the check book and the cash blotter. You didn't tell us that there was such a book when you recited them on your direct-examination? A. I said there were blotters; there is a stock blotter and a Clearing House blotter and an odd lot blotter and a cash blotter and a cotton and wheat blotter.

107 Q. That is 5 blotters; you kept the cash blotter, and what else? A. And the check book.

Q. Did you keep any of the other books? A. I kept the money loan book.

Q. Any other books? A. And the stock loan book; I guess that is all. I had helped with some of those books, though.

Q. But you wrote a good many of the entries in each of those books? A. Yes.

Q. Did you write any of the entries in any of the other books? A. Occasionally.

Q. How do you know the other books were correctly kept, if you didn't keep them yourself? You
108 have testified that these books were correctly kept; how do you know they are correct? A. I know from the trial balance; I didn't say there was a trial balance book; that is another book. I knew from the trial balance and from general work on the books.

Q. Trial balances only show that your figures balance; there may be a great many mistakes and yet the books may balance; the books may be incorrectly kept; now, how can you testify that the books were correctly kept unless you kept them

all? A. I don't know, except from general knowledge of it. 109

Q. Isn't that your general opinion only? A. Well, it is backed by more than that, I think.

Q. Yes; some experience; but your opinion is that the books were correctly kept? A. Yes.

Q. You can't speak of your own knowledge, because you didn't make the entries in a great many of the books? A. No, in a great many of them I didn't.

Q. To come back to the pool agreements that you have mentioned; where did you last see those? In your office, was it? A. Yes.

Q. Do you know where they are now? A. I do not, no. 110

Q. If you wanted to find them, how would you go about it? A. I suppose I would be liable to ask Mr. Sherwood if he knew where they were.

Q. Did you notice whether there was any Trustee under these pooling agreements? A. I did not notice, no.

Q. Who were the parties to them? A. I couldn't give them all offhand.

Q. But you do remember that there were some parties, do you? A. Some parties to the agreements? 111

Q. Yes? A. I remember there were some parties.

Q. Do you know whether they were turned over to the Trustee in bankruptcy? A. I do not know, no.

REDIRECT-EXAMINATION BY COUNSEL FOR THE COMPLAINANTS:

By Mr. Wolf:

Q. You testified that you kept the trial balance book? A. No, I didn't.

112 Q. Who kept that? A. Max Isaacs.

Q. He was one of the employees? A. Yes.

Q. Did you see the trial balance sheet every month? A. Yes.

Q. How often was the trial balance taken? A. Once a week.

Q. Did you see it every week that it was taken? A. No, not necessarily every week.

Q. How often would you see the trial balance sheet? A. At least once a month.

Q. You saw that it was correct?

Objected to. Question withdrawn.

113

Q. Well, did you notice whether it was correct or incorrect? A. I noticed to the best of my ability that it was correct.

Q. Did you have general knowledge and supervision of the entries in the books which you did not yourself physically keep? A. I had general knowledge of them, yes.

Q. Were you the member of the firm of J. M. Fiske & Company that had general charge and supervision of the books? A. Yes, I had charge of them.

114 Q. And as such member of the firm of J. M. Fiske & Company you had general knowledge and supervision of the entries in the books which you yourself did not physically keep? A. Yes.

RECROSS-EXAMINATION BY COUNSEL FOR THE DEFENDANT:

By Mr. Larkin:

Q. What was this general knowledge? What did that consist of? A. Well, I saw practically nearly all the entries that went into the books.

Q. Do you mean to tell me that you saw all the

entries that went into the purchase and sales book, 115
the long and short book, the blotters you didn't keep, the ledger and the stock blotters; you saw all those? A. I did not necessarily see them all, but I had a general idea of what was in them.

Q. Suppose one of the clerks had written an entry on both sides of the book which balanced; should you know anything about the correctness or incorrectness of the entry, as long as there was a general balance at the end of the month? A. It might be possible that it would escape me.

Q. Would you know anything about that entry? A. Well, if it was called to my attention; if I noticed the entry I would look it up. 116

Q. But suppose there was an entry of a purchase of 100 shares of New York Central at a certain price, and another entry on the other side of a sale of the same at a certain price, both of these entries representing fictitious transactions; was there anything about such entries in the books to bring the entries to your attention? A. No, I might not know about it; an entry might be put through that way.

Q. You couldn't possibly know about the correctness or incorrectness of every entry in these books, could you? A. No. 117

Q. Which book in your office was the book of original entry? A. The purchase and sale book, and the cash blotter had some original entries in them.

Q. Those are books of original entry? A. They are books of original entry, yes.

Q. What is there about them in the way of original entry? A. The reports that come up from the Stock Exchange.

Q. Where are those? A. They were there at the time in the office.

118 Q. When did you last see them? A. I last saw them some time in January, before we closed up.

Q. Before or after the 19th of January? A. I don't think I have seen them since the 19th; not that I remember.

Q. You don't know where they are now, do you? A. No; they were kept in the office, and I suppose they were taken with the rest of the books.

Q. What were those slips? A. Reports of purchases or sales of stock on the Exchange.

Q. How did you get them? A. They were sent up from the Board.

119 Q. By whom? A. By the broker who executed the transaction.

Q. Who received them? A. The purchase and sales clerk.

Q. What did he do with them? A. Entered them into the purchase and sales book.

Q. What did he do with the slips? A. They were kept for reference.

Q. Did you see slips that came in? A. No.

Q. Did you see that each entry was made in the purchase and sales book? A. No.

Q. After they were put in the purchase and sales book, what happened then? A. From there
120 they were put into the blotter, the stock blotter.

Q. Who put them in the blotter? A. The bookkeeper, Max Isaacs.

Q. Did you compare them to see that they were correctly put into the blotter from the purchase and sales book? A. No.

Q. After they went into the blotter, what happened to these entries? A. A good many of them were posted into the ledger.

Q. Do you know anything about whether they were correctly posted in the ledger? Did you compare them? A. No.

Q. Who kept the ledger? A. The bookkeeper, 121
Max Isaacs.

Q. You spoke of a petition in bankruptcy being filed on the 19th of January, 1910; when was that filed? What time of day? A. I don't know.

Q. Was it before you opened business? A. No.

Q. Was it after you closed business; that is, after 3 o'clock? A. It was before 3 o'clock; I think it was before 3 that it was filed.

Q. How soon before 3? A. I don't know the time.

Q. Well, aren't you guessing at the time, really? A. I haven't said any time.

122

Mr. Hays: We all agreed that we would take the record itself.

HARRISON S. MARTIN, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Wolf:

Q. What is your business? A. Assistant Secretary of the New York Stock Exchange.

Q. Were you Assistant Secretary of the New York Stock Exchange on the 19th of January, 1910. A. I was the Second Assistant Secretary.

Q. On the 19th of January, 1910, did the Secre- 123
tary's office receive a written notice of the suspension of J. M. Fiske & Co.?

Objected to as immaterial and irrelevant.

Objection overruled.

Defendant excepts.

A. We did.

Q. Have you produced it? A. I have.

The notice is offered in evidence.

Same objection, ruling and exception.

124 It is marked Plaintiff's Exhibit 3 of November 2, 1910, A. S.

[Printed herein at p. 379.]

Q. What hour was that received by the Secretary's office? A. Forty minutes after twelve.

Q. Who is G. W. E.? A. Mr. Ely wrote that in my presence.

Q. George W. Ely? A. Yes, sir.

Q. Who is he? A. He is the Secretary of the Stock Exchange; the notice was handed to me, and I handed it to Mr. Ely, and he endorsed the figures on in my presence.

125

CROSS-EXAMINATION BY COUNSEL FOR THE DEFENDANT:

By Mr. Larkin:

Q. This is a customary form of notice that members of the Exchange send when they are unable to keep their Exchange contracts, is it not? A. There is no customary form in that sense; we don't prescribe a form; it is usually done when they are unable to meet their obligations.

Q. The rules of the Exchange require that when a member thinks he is not able to meet his obli-
126 gations that he notifies the proper persons? A. Yes, sir.

Q. And this is done in accordance with the rules of the Exchange? A. I presume Mr. Fiske did it for that reason.

PERLEY MORSE, being duly sworn and examined as a witness for the complainant, testifies:

By Mr. Wolf:

Q. What is your business? A. I am a certified public accountant.

Q. Where is your office? A. At 43 Exchange Place. 127

Q. How long have you been engaged in that business? A. 18 years.

Q. In the course of the business have you had any experience in examining books of stock brokers? A. Yes.

Q. How much experience?

The qualifications of the witness are admitted.

Q. Did you examine any or all of the books of J. M. Fiske & Company? A. Yes. 128

Q. When did you begin that examination? A. On the morning of January 20th, 1910.

Q. From whom did you receive the books? A. When I went into the office of J. M. Fiske & Company the books were there in the safe, and we took them out and put them on the desk and started in to make an examination.

Q. What books did you find there? A. Various blotters.

Q. Do you know what they were? A. Yes.

Q. Just name them as you go along. A. Cash blotters, stock blotters, purchasing and sales books, ledgers, trial balance books, loan books, long and short books, various books usually kept in a broker's office. 129

Q. You say you proceeded to make an examination of the books? A. Yes.

Q. Did you find the books correctly kept?

Objected to until the books are proven.

Q. Did you find those books correctly kept?

Objected to as incompetent.

130 By the Referee:

Q. Can you tell whether they represented genuine transactions? A. Yes.

Objection overruled.

Defendant excepts.

Q. What did you find with respect to the way the books were kept? A. They were kept in a pretty fair condition on the average.

Q. What do you mean by that? A. Take the average Wall Street house; the books were in balance, and I was able to take off the trial balance
131 of the books and make my debits equal my credits; that proved that the dollars and cents part of the entries were correct, and I was able to bring down the long stocks and short stocks and then prove where those stocks were.

Q. By the books? A. By the books.

Q. That is, the books showed where the long stocks were, and where the short stocks were? A. I proved all the stocks and verified all the entries; I even got a verification from the banks, brokers, trust companies themselves where the securities were placed, so that I could see the securities actually were there, and they agreed with the
132 books.

Q. You are talking of stocks; that is, talking of the assets of this concern of J. M. Fiske & Company? A. Yes.

Q. You found that certain stocks were in their possession according to the books, and certain stocks were pledged with banks and others? A. Yes.

Q. And where you found they were pledged with banks you verified them personally? A. Yes, I got a verification from the banks.

Q. And the books showed where and how and 133
for how much they were pledged? A. Yes.

Q. And where there were short stocks what was the condition there? A. Where there were short stocks the firm had to borrow those stocks from other brokers.

Q. Were there entries in the books showing where they had borrowed them? A. Yes.

Q. And were the entries in such shape that you could figure by the account the short stocks? A. Yes; and those short accounts were verified from the statements of the brokers.

Q. So you not only made an examination of the 134
entries of the books in order to ascertain what the assets and liabilities of the firm were, on the 19th of January, 1910, but you verified the work that you did? A. Yes.

Q. From outside sources? A. Yes.

Q. And you verified the correctness in that way of the entries in the books? A. Yes. I might state, also, that I obtained verifications from the customers' accounts; from the customers themselves, to show that they were long or short the stock shown in J. M. Fiske & Company's books.

Q. Did you examine all of the books? A. Yes.

Q. You got them originally right there from the 135
office on the 20th of January, 1910? A. Yes.

Q. In whose possession have they been since; in possession of the Receiver, and subsequently the Trustee's? A. Yes.

Q. You were employed by the Receiver to make this examination? A. Yes.

Q. And subsequently you were employed by the Trustees? A. Yes.

Q. Mr. Irving L. Ernst was the Receiver? A. Yes.

Q. And then Mr. Ernst, with Lindsay Russell

136 and Harford T. Marshall became trustees? A. Yes.

Q. And the possession that you have had of the books has been for the Receiver and the Trustees? A. Yes.

Q. Have you made from the books an examination to ascertain what the assets and liabilities of the firm of J. M. Fiske & Company were at the 19th of January, 1910? A. Yes.

Q. Have you made an examination also with reference to any particular hour on that day? A. Yes.

Q. With reference to what hour? A. 12 o'clock.

137 Q. Will you please state what the assets of J. M. Fiske & Company were, according to their books, on the 19th of January, 1910, at 12 o'clock?

Counsel for the Defendant: I object as immaterial, incompetent and irrelevant; it does not appear yet that the books were correctly kept, and the books have not been proven; the witness merely took what he found and what are supposed to be the books for examination, and struck a balance from them and found some figures; we are entitled to have the books proven by those who kept them in the regular way, before we have testimony from some expert who came in and examined the books

138 to find out what these books show; we don't know whether these transactions are correct or incorrect transactions.

The Referee: I will take this testimony now.

Defendant excepts.

A. The assets at 12 o'clock on that day, the 19th of January, 1910, were $745,657.60.

Q. Will you state in a general way what are included in those assets? What they consist of. You have a list before you? A. Yes.

Q. What is the list that you have? A. (Indicating.) Here is the trial balance, and here is the summary of the trial balance by pages. 139

Q. So that the pages of paper which you have before you contain a statement of the assets in one of the columns? A. Yes.

Q. And this paper that you have before you you call in bookkeeping parlance a trial balance? A. A trial balance.

Q. What did these assets consist of?

Counsel for Defendant: Objected to unless the witness shows that he has some knowledge of the value of each of these securities, or property, whatever it is. 140

Objection overruled.

The Referee: He is only asked what the assets consist of.

Counsel for Defendant: I do not object, as long as he gives no values.

A. The assets consist of various sums of money due from customers; and the proceeds of sales of stocks.

Q. In taking the assets of the amounts due from customers have you in those statements of assets taken all those accounts at their face value? A. Yes. 141

Q. All at their face value? A. Yes.

Q. Without any regard to whether the accounts were good or not? A. Yes.

Q. And the other item that you have spoken of was stocks that were either long or short? A. Yes.

Q. And were either in loans or possession of the firm? A. Yes.

Q. The names of those stocks all appear upon the books which you examined? A. Yes.

142 Q. And the number of shares of stock all appear on the books that you examined? A. Yes.

Q. In what way did you compute the value of those stocks as of 12 o'clock, 19th January, 1910? A. I took the price of the last sale, at precisely 12 o'clock, from the official price list of the New York Stock Exchange.

Q. Were they all listed stocks? A. They were all listed stocks on the New York Stock Exchange.

Q. (Producing papers to witness.) I show you some printed papers and ask you whether you know whether those are the official lists of the New
143 York Stock Exchange?

Objected to as incompetent, irrelevant and immaterial.

The papers are produced to Counsel for the Defendant for inspection.

Counsel for Defendant: This is not an official list of the New York Stock Exchange.

Q. These are the papers which you examined? A. Yes.

Q. Are you familiar with papers of this kind? A. Yes.

Q. Have you ever seen them before? A. Very
144 often.

Q. For how many years? A. 18 years.

Q. Do you know from your knowledge of stock brokers' affairs in the City of New York whether the prices shown on these papers which you have identified are accepted generally as the prices at which stocks are bought and sold in the market?

Objected to as incompetent.

Objection sustained.

Plaintiffs except.

The papers are marked as a whole, Plaintiffs' Exhibit 4 for Identification of November 2, 1910, A.S. 145

Q. You say that you took the prices from the paper which has been marked Plaintiffs' Exhibit 4 for Identification?

Objected to.

The Referee: I will admit it as a fact.

Defendant excepts.

A. Yes.

Q. Did you ascertain what the liabilities were on the same day at 12 o'clock, in the same way? 146
A. Yes.

Q. What were the liabilities? A. $902,617.76.

Q. Will you please give us the list of outstanding accounts that are included in the assets of this $745,000 odd?

Objected to on the ground that the books are not proven; that these are merely memoranda taken from what are supposed to be the books; we don't know whether they are the correct books of the firm.

The Referee: He may state this now, and, if you insist upon it, we will have to have all the books here, and verify each of them. 147

Defendant excepts.

A. George S. Andes, $828.76; Joseph Baer, $2,193.69; E. Brooks, $577.73.

It is consented that the witness may substitute in lieu of his testimony a list of the accounts included in the assets.

The papers marked Exhibit 4 for Identification are handed to Counsel for the Defendant for inspection.

148 Q. Will you give us the total amount of outstanding accounts which are included in the statements of assets of $745,000 odd? A. I couldn't give that to you readily from these papers; it is all added in together.

Q. Well, you can give it to us? A. I can, yes.

Q. Included in those accounts, is there an account of J. M. Fiske No. 2? A. Yes.

Q. Is there an account known as the Four-Fourths Pool No. 2? A. Yes.

Q. How much is the account of J. M. Fiske No. 2? A. The account of J. M. Fiske No. 2 I haven't
149 considered in those figures on account of his being a member of the firm, and being in bankruptcy personally.

Q. Now the Four-Fourths No. 2, how much is included in that account? A. $67,840.79.

Q. Have you included in those accounts an account against John Felix, known as the stock account? A. Yes.

Q. How much is that? A. $13,974.37.

Q. Have you included in the account also one named John Felix Special Stock Account? A. Yes.

Q. How much is that account? A. $36,367.49.

Q. Have you included in the accounts also one
150 named John Felix Grain Account? A. Yes.

Q. How much is that? A. $10,262.36.

Q. Have you included one John Felix Cotton Account? A. Yes.

Q. How much was that account? A. $3,415.75.

Q. Have you included an account against C. C. Fulton? A. Yes.

Q. How much was that account? A. $2,473.80.

Q. Have you included the account against Lathrop, Haskins & Company? A. Yes.

Q. How much was that account? A. $40,773.68.

Counsel for Plaintiffs: I suppose right here that 151
the defendant will concede that Lathrop, Haskins & Company failed on the same day, and that a petition in bankruptcy was filed against them on the same day.

Counsel for Defendant: I understand so, yes.

Q. Robert F. Little; do you find an account against him named "Special"? A. Yes.

Q. How much is that? A. $14,269.72.

Q. That is included in your statement of assets? A. Yes.

Q. Do you find another account against Robert F. Little No. 1? A. Yes, sir, for $13,973.81. 152

Q. Do you find an account there against one Charles McLean of the Hotel Majestic? A. Yes, sir.

Q. How much is that account? A. $8,874.46.

Q. Was that included in your statement of assets? A. Yes.

Q. Do you find any against A. P. Morison which are included in your statement of assets? A. Yes, sir.

Q. One account against A. P. Morison? A. Yes, $34,732.69.

Q. And one against A. P. Morison known as the No. 9 account? A. Yes, for $34,292.40. 153

Q. And one against A. P. Morrison known as "Privilege" account? A. Yes, $67,083.20.

Q. And one against him on a note, or entitled "A. P. Morison, Note"? A. No; that note I haven't included. It is the custom among brokers not to put notes down on the ledger.

By Mr. Larkin:

Q. Don't you regard a note as an asset? A. Yes.

154 By Mr. Hays:

Q. M. Schnitzer; do you find an account against him? A. Yes, sir.

Q. How much is that? A. $14,876.84.

Q. Is that included in the statement of assets? A. Yes, sir.

Q. Do you find accounts against G. T. Sullivan? A. Yes, sir.

Q. One against G. T. Sullivan, Manager? A. G. T. Sullivan, Manager, Cotton Account.

Q. How much was that? A. $5,840.

Q. That is also included in the statement of as-
155 sets? A. Yes.

Q. And against the Sullivan Grain Account? A. Yes, $25,610.50.

Q. And a pool account? A. There isn't any.

Q. Do you find an account against Harry E. Stevens, which you included in the statement of assets? A. Yes, sir.

Q. How much was that? A. $4,346.83.

Q. One against Miss Martha L. Stevens? A. Yes, sir, for $3,836.21.

Q. One against Mrs. Sarah L. Stevens? A. Yes, sir.

Q. How much was that? A. $3,817.20.

156 Q. Did you find an account on the books against C. M. Washburn, and if you did, was that included in your statement of assets? A. Yes, sir.

Q. Did you include that in your statement of assets? A. I did, because there was stock in the account.

Q. How much did you include of that account? A. $21,559.42.

Q. And this C. M. Washburn was one of the members of the firm of J. M. Fiske & Company, was he not? A. Yes, sir.

Q. The amount which you have given us, is that the amount which you included in the total state-

ment of assets? A. Yes, sir, I did that for the 157
reason that there was stock in that account.

Q. And you included the stock in the assets also? A. Yes.

Q. William I. Walker; do you find an account against him? A. Yes, sir.

Q. What is that account; how much? A. $18,577.51.

Q. Did you include that amount in your statement of assets? A. Yes, sir.

Q. As I understand it, the $745,000 odd of assets which you have given include all these outstanding accounts which I have specially interrogated you 158
about at their face value? A. Yes.

Q. Have you a statement there showing how the total amounts of $972,000 of liabilities was made up? A. Yes, sir.

Q. Can you make up an itemized statement of that also, so as to put it in the record in place of calling off each name now, and the amount? A. Yes, sir.

CROSS-EXAMINATION RESERVED.

JOSIAH M. FISKE, being duly sworn and examined as a witness for the plaintiffs, testifies:

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By Counsel for the Plaintiffs:

By Mr. Hays:

Q. You were a member of the firm of J. M. Fiske & Co.? A. Yes, sir.

Q. At the time of the failure? A. Yes, sir.

Q. And for how long prior thereto? A. Sixteen or seventeen years; ever since the firm has been in existence.

Q. What did you do in connection with the firm?

160 A. I looked after the front office and general overseeing.

Q. You have an account upon your books against A. P. Morison, and one against A. P. Morison known as No. 9 account, and one against A. P. Morison called "Privilege Account." Did you know him? A. Yes, sir.

Q. Who was Mr. Morison? A. Mr. Morison was a customer of ours; he has done business with us for a good many years.

Q. Well, all these accounts were against Mr. Morison, although they were designated in a dif-
161 ferent way How long had they been standing against him? A. The books will show.

Q. Do you remember? A. I couldn't tell you.

Q. Well, about how long before the failure? A. I couldn't say.

Q. Can you give me any information about it? A. They had been there for a long time; I couldn't say exactly how long; a matter of several years.

Q. All of them? None of them were recent. A. Well, the account has varied; at times he would do something, and then again he wouldn't.

Q. Had you made any endeavors to collect from Mr. Morison? A. In a measure, yes.

162 Q. Were you able to collect from him? A. Occasionally, from time to time.

Q. How much did you collect from him? A. I couldn't say exactly; it is in the books.

Q. Do you know what his financial condition was, at the time you failed? A. He was down and out.

Q. How long had he been down and out? A. I couldn't say.

Q. A week or ten days? A. A little bit longer than that.

Q. About how long? A. I couldn't say exactly;

I didn't know that he was, absolutely, till we did 163
fail; I didn't absolutely know that he was insolvent——

Q. Did you know that he was insolvent at the time you failed? A. At the time I failed I found he had nothing.

Q. Take the Four-fourths pool account on your books; what was that account? A. That was our interest in the Columbus and Hocking Pool.

Q. So that the persons who were liable for whatever was due on that account, were the members of your firm of J. M. Fiske & Co? A. Yes.

Q. I find on your books some accounts against 164
John Felix; there are four accounts mentioned; the John Felix stock account; the John Felix special stock account; the John Felix grain account and the John Felix cotton account; whose account was that? A. John Felix's.

Q. Who was he? A. He was a customer of ours that was brought in by Mr. McLean.

Q. How long had those accounts been upon your books? A. A matter of a couple of years I should say; three years, perhaps.

Q. Do you know what the condition of John Felix was at the time of your failure; his financial condition? A. I knew that he never was any good; 165
I knew that.

Q. At the time you failed, he wasn't collectible?

Counsel for the Defendant: I object to "He wasn't any good."

Counsel for the Plaintiffs: I asked whether his accounts were collectible.

Question withdrawn.

Q. You had known him for how long? A. Nearly as long as he had been in the office; I should say a matter of about three years.

166 Q. Had you tried to collect from him? A. From time to time, and he paid occasionally.

Q. What do you know of his financial condition in January, 1910? A. At the present time I know that he had nothing.

Q. You know now that he had nothing? A. Yes, sir.

Q. You know now that he had nothing in January, 1910, and how long previous to that?

Objected to as not proven.

Objection overruled.

167 Defendant excepts.

A. I know now that he had nothing then.

Q. Do you know Mr. C. C. Fulton? A. Yes.

Q. You knew you had an account against him on your books? A. Yes.

Q. How long had you known him? A. I had known him for about five years.

Q. How long had this account been standing on your books? A. The account varied from time to time; he has done business for us and we have advanced him money.

Q. Do you know what his financial condition
168 was at that time? A. I felt that he was perfectly good for it; if we had continued business he would have undoubtedly worked his account out.

Q. What is his business? A. Broker; he is on the curb.

Q. Do you know of any assets that he had on the 19th of January, 1910? A. I couldn't name them, no.

Q. Did you know of any, or do you know of any now? A. I was making arrangements in the first part of December towards helping him get a seat on the Cotton Exchange; the money was to have been loaned to him.

Q. Well, that wasn't what I asked you; I asked 169
if you knew of any assets in January, 1910? A. I supposed he had something.

Q. I say, do you know? A. But I don't know positively.

Q. Robert F. Little; you had an account against him? Yes.

Q. Who was he? A. He was a man that I knew.

Q. How long had that account been on your books? A. About two years.

Q. Did you know what his financial condition was at that time? A. I considered that he was worth something over a quarter of a million dol- 170
lars.

Q. On January 19, 1910? A. Up to January 19th.

Q. Do you know now what his financial condition was on January 19th? A. When Hocking broke, he did.

Q. Was he interested in the Hocking pool? A. Not in the pool; he was interested in his own account.

Q. In stock? A. Yes, he was interested in the Hocking stock and other stocks, but not in connection with any pool.

Q. Charles McLean? A. He was an employee. 171

Q. A clerk of the firm of J. M. Fiske & Company? A. Yes.

Q. How long had he been a clerk? A. I should think he had been with us three or four years.

Q. How long had this account been on your books? A. He has always had an account on our books.

Q. Do you know what his financial condition was on January 19, 1910? A. Yes.

Q. What was it? A. I considered that he would be able to pay anything that he owed us; in fact,

172 it was a question whether we shouldn't owe him something.

Q. Do you knew of any assets he had or thought he had at that time? A. No.

Q. You paid him a salary? A. We did.

Q. Do you know where he lived? A. He lived at the Hotel Majestic.

Q. Do you know a man named Marcus Schnitzer? A. Yes.

Q. You had an account against him on your books? A. Yes.

Q. Do you know what his financial condition
173 was? A. Rotten; I found it out after he stuck me.

Q. How long ago was that; before January?

A. It shows in his account.

Q. Well, about how long? A. I couldn't tell you.

Q. Well, it was some time before January 19th that you knew he was insolvent, or not collectible?

Objected to as to form.

Question withdrawn.

Q. Well, you knew his financial condition prior to January 19, 1910, did you not? A. I knew his condition, but had expectations of getting some-
174 thing from him, though.

Q. Do you know Mr. Sullivan. A. Yes.

Q. You had accounts against him on the books?

A. Yes.

Q. Who was he? A. He was a customer.

Q. What was his business? A. Speculating.

Q. Do you know what his financial condition was in January, 1910? A. It was——no, I don't think it was good for much.

Mr. Larkin: He asked if you knew; don't guess at it.

Q. Did you have an account against a man named Harry L. Stevens? A. He was an employee. 175

Q. How long had he been an employee? A. I should think about three years; two or three years.

Q. What was he; what kind of an employee? A. He was in the front office, looking after things.

Q. What salary did he get. A. I don't remember.

Q. Do you know what his financial condition was in January, 1910, January 19? A. Previous to January 19, it was good.

Q. Do you know what assets he had previous to January 19? A. I couldn't state; it is a matter of impression. 176

Q. On the 19th of January what was his condition? A. He broke with Hocking.

Q. He also was interested in Hocking? A. I think he was, as I remember it.

Q. How about Martha L. Stevens; you had an account against her? A. I couldn't tell you any details about her; I don't know the details of that account.

Q. Who would know it; which member of the firm? A. Mr. Harry L. Stevens would know it.

Q. What is his address? I don't know his address. 177

Q. Did you have an account against C. M. Washburn? A. He was a partner.

Q. Well, he had an account; that is, the firm had an account against him? A. Yes, sir.

Q. And he was one of the partners of J. M. Fiske & Company? A. Yes.

CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT:

By Mr. Larkin:

Q. Mr. Fiske, to come back to Mr. Morrison; you stated that the account had been standing for

178 several years, and you expressed some opinion as to his financial standing; now, what opinion did you give? A. Mr. Morrison is a man that if he made money would pay.

Q. You say he has paid from time to time? A. Yes.

Q. Did you ever make a demand on him after the 19th of January to pay you anything? No, sir; not after the 19th.

Q. Did you ever make a demand on him prior to the 19th of January to pay, and he didn't pay? A. Yes, in part.

179 Q. What do you mean by "in part?" A. We have asked him for money from time to time, and every once in a while he would let us have some.

Q. And you were satisfied with that condition of the account? A. I had to be.

Q. I ask you whether you were satisfied with that condition of the account? A. No, naturally.

Q. Did you at any time regard the account as not a collectible account prior to January 19, 1910? A. No, sir, I expected to get every cent of it.

Q. You make representations, do you not, as to your assets and liabilities from time to time to the
180 firm? A. No, sir.

Q. You always regarded that as an asset, did you, a collectible asset? A. Yes.

Q. John Felix; you expressed some opinion about his financial condition; what is that based on, your opinion? A. Promises on his part, very largely.

Q. What were his promises? A. He promised to make good what he owed us.

Q. Well, he didn't do it prior to the 19th of January? A. No, sir.

Q. How soon prior to that did he make you any

payments? A. Any payments that were made the 181
books will show.

Q. But you don't remember? A. No, sir.

Q. He may have paid you a week or two before, something on account? A. Possibly.

Q. Did you regard that as a collectible account? A. Not entirely.

Q. You regarded it as a live account and an asset of your firm for its full value? A. Practically its full value.

Q. You spoke of a Mr. Fulton and expressed some opinion as to his financial condition; before January 19, 1910, did you regard that account as 182
an uncollectible account? A. Not by any means.

Q. It was a good account? A. Yes, sir.

Q. And on the morning of the 19th of January it was a good account? A. I considered it so.

Q. Do you consider it a good account now? A. I haven't had the opportunity of asking him any questions.

Q. You don't know? A. I don't know; I know that his family have money, but I don't think he personally has.

Q. As far as the people you have testified about before are concerned, you don't know what their financial condition is to-day, do you? A. No, sir; 183
only from what I have heard through the examination.

Q. Well, nothing but hearsay; of your own knowledge do you know what their financial condition is to-day? A. Positively, no.

Q. Mr. Little has been mentioned, and you expressed some opinion as to his financial condition; how long has he traded with you? A. About two years.

Q. And the account was a satisfactory one to you? A. It always has been.

184 Q. And he paid as you demanded it? A. Yes, sir.

Q. You regarded it as a live account and an asset on the morning of the 19th of January, 1910? A. I certainly did.

Q. Do you know anything about his financial condition now? A. I suppose it is bad, because he doesn't pay.

Q. How do you know he doesn't pay? I am asking for your knowledge now? A. Well, I don't know anything about it, whether he pays or whether he doesn't.

185 Q. Now, Mr. McLean; you say he is one of your employees and has been so for three years and has had a speculative account with you? A. To a limited extent, yes.

Q. Did you regard that account as not an asset at any time prior to the 19th of January, 1910? A. No, sir; I regarded it as an asset.

Q. How do you regard it now? A. The man lost his job when he left me; therefore he has got nothing; but he has got a salary now.

Q. Do you know that he has nothing? He only had a salary with you, didn't he? A. Yes, but he had a chance to work it out.

186 Q. But he has a salary now; it doesn't make and difference who pays him? A. I suppose so.

Q. You think it does make a difference? A. No.

Q. He has the same capacity to earn that he had before? A. There is a difference between myself and the trustees, when I said I didn't think I would get anything out of it.

Q. You think you are a better collector than they? A. Well, I don't know; I can hardly say that.

Q. You expressed in respect to Mr. Schnitzer some opinion as to his financial condition; do you

know anything about it, personally? A. I simply 187
know that the man told me he couldn't pay.

Q. When did he tell you that? A. When we tried to collect money.

Q. When was that? A. When he gave us notes, and the notes came due.

Q. When was that? A. Shortly after the obligation was——

Q. Can't you fix the dates? A. Only from the books.

Q. Was it before the 19th of January? A. Oh, yes.

Q. And you asked him to pay, and he said what? 188
A. He said he couldn't; he gave us notes. Some were endorsed by his wife and some by a man by the name of Rosenfeld, who has since become a bankrupt.

Q. How did you regard these notes; as an asset of your concern? A. I did regard them as an asset, yes.

Q. You thought they were collectible? A. I thought they would be, in time.

Q. What do you think since the 19th of January wth reference to him? A. I haven't heard anything about it.

Q. Then what do you base this opinion on; you 189
said he was rotten? A. It was before the 19th of January.

Q. But you said you had a note signed by his wife that you thought was collectible; why do you say he is rotten; you haven't heard anything since that time; what has changed your view? A. I don't know.

Q. Now, Mr. Sullivan; tell us all about him; why you expressed an opinion as to his financial condition? A. When he left us he went to work for another concern.

190 Q. You mean when he left you; was he an employee of yours? A. No, we couldn't stand for him and his methods, and so we put him out.

Q. Was he a customer? A. He was a customer.

Q. When did you put him out? A. Approximately the time his account was closed.

Q. When was that, do you remember? A. No, sir, I would have to refer to the books.

Q. He owed you money? A. Yes.

Q. Have you ever asked him to pay it? A. No.

Q. Do you know whether anybody else ever asked him to pay it? A. No.

191 Q. How do you know anything about his financial condition? A. From hearsay; what I read in the newspapers.

Q. What have you seen in the newspapers? A. I saw that he was an employee of B. F. Scheftels, and that he was arrested and out on bail.

Q. Does that indicate anything about his financial condition? A. Not necessarily.

Q. Then why do you mention that as determining your mind with respect to his financial condition? You are expressing an opinion now of these accounts, and I want to know the basis of it? A. Well, I have considered the accounts good until I

192 positively found that they were absolutely bad, and then they have been charged off.

Q. In this case you don't know anything of Mr. Sullivan except that he has gone to another firm, and something that you saw in the newspapers; you don't know whether it is good or bad to-day? A. No.

Q. Mr. Stevens and Miss Martha Stevens and Mrs. Sarah Stevens; do you know of your own knowledge whether those accounts are good to-day? A. I know what he has told me; he has said that he has not got the money.

Q. But if you were in business now in a going

concern and a man told you that he didn't have the 193
money to pay you would you therefore say that he was no good and write the account off? A. It doesn't necessarily follow that I always would, no; when I find out that an account is absolutely bad then I write it off.

Q. That is all the information you have had about him? A. I have seen him subsequently.

Q. When? A. This week.

Q. Did you ask him to pay? A. I have no interest in his collections.

Q. He has only had one demand made on him since that time?

194

A. I don't know whether he has had any made on him; yes, I do know that he has had a demand made on him; the attorneys for the Receivers have made a demand on him.

Q. Can you say of your own knowledge that he cannot or will not pay? A. He has told me that he cannot pay.

Q. When? A. At the time the demand was made on him by the trustees.

Q. Were you present? A. I was not present; he told me.

Q. It was after the time then? A. At the time the demand was made.

195

Q. After the time? A. Well, approximately at the same time; not previous.

Q. But if you weren't present, it must have been after the time? A. Approximately at the same time.

Q. Do you know whether anything else has been done? A. I do not; it is in the hands of the trustees.

Q. Have you any other information on the subject of Mr. Stevens? A. In what respect?

196 Q. About his financial condition? A. What he has told me.

Q. What did he tell you? A. That he was unable to pay, and that he didn't have any money and would like to make some money, and he asked if I had a job for him, and a few other things like that.

Q. Do you think he can't pay ever? A. I think he can pay in time.

Q. Did you hear the testimony of Mr. Morse today? A. Yes.

Q. You heard the names of certain persons
197 whose accounts figured as assets? A. Yes.

Q. You have a client named Berth Levy? A. That was a customer on our books.

Q. (Repeated.) You have a client named Berth Levy? A. I am not a lawyer, sir.

Q. Did you have a client? A. No, sir.

Q. There is no name of Berthe Levy on your books? A. No, sir; there is a Berth Levy, who was a customer of ours.

Q. You call your clients customers, do you? A. Yes.

Q. Where does he live? A. I don't know.

Q. Who brought him in and introduced him to
198 you? A. Mr. Little.

Q. Who is he? A. He is a friend of Mr. Sherwood's and Mr. Haskins and myself.

Q. You don't know where he lives at all? A. No; he has an office in Front street, I believe, but I am not sure.

Q. Do you know what business he is in? A. I think the manufacturing of sausage cases, or something of that sort.

Q. Do you know anything about his financial condition? A. Do I know, or is it a matter of opinion, do you mean?

Q. You have only been giving opinions, and that 199
is all I can expect. Give us either one you want; fact or opinion? A. My opinion was that he was well-to-do previous to the break in Hocking.

Q. Well, I asked you about his present condition? A. I don't know his present condition.

Q. He seems to have had two accounts with you; did you know that? A. Yes.

Q. What was the object of two accounts: was there anything special in respect to these? A. We were interested in one of the pools, for account of Mr. Levy, and, in order to keep his account straight and keep our account with the pool managers 200
straight, we ran one account for Mr. Levy, and the other account was his personal trade account, entirely separate from any Hocking pool.

Q. There were two pools, were there not? A. Yes, sir.

Q. And they were regular written pool agreements? A. Yes.

Q. Do you know where they are? A. I believe that the trustees have them, but I am not positive.

Q. When did you last see them? A. Shortly after the failure.

Q. When did you first see them? A. When they were sent to us; before they were signed; at the 201
time they were made.

Q. Did you sign that agreement? A. Personally?

Q. Yes? A. I don't think so.

Q. Did you sign the agreement on behalf of Mr. Levy? A. The firm signed on behalf of Mr. Levy.

Q. And the last you have seen of these pool agreements, was when? A. Shortly after the failure.

Q. How soon after? A. About the next day; the

202 agreements were taken up to the Stock Exchange for their information, to show to them.

Q. Who took them up? A. I took them to one of the Governors, and they were returned to the office.

Q. What became of them after they were returned to the office? A. I don't know.

Q. Did anybody ever ask you for them? A. Not further, no.

Q. Did you ever tell Mr. Levy what the condition of the pool was? A. He received his notices.

Q. Did you ever tell him what the written conditions of the pool were? A. He understood it, as far as I know, absolutely.

Q. Did you hand him a copy of the pool agreement? A. I couldn't say.

Q. What makes you say he understood it? A. I think he saw the original agreement in our office.

Q. You had a customer by the name of W. B. Boorum? A. Yes.

Q. Did you know him personally? A. Yes.

Q. Where did he live? A. In Englewood, New Jersey.

Q. What was his financial condition? A. Good, up to the 19th of January, 1910.

204 Q. E. L. Gilbert; do you know anything about him? A. Yes.

Q. What do you say about him? A. He was down, and would pay when he could; I considered it a good asset in time.

Q. You considered it worth a hundred cents on the dollar on the 19th of January, did you not? A. For cash that day? No; in time, yes.

Q. Did you know anything about the books of your concern? A. A little.

Q. Did you ever make any entries in them. A. Occasionally.

Q. What books did you make entries in? A. According to where the work was heaviest. 205

Q. Do you remember any particular time that you made any entry? A. Can I name one particular entry?

Q. Yes; any time that you made any entry? A. Why, yes.

Q. When was the last time before January 19, 1910, that you made an entry in your books? A. I couldn't say.

Q. Would you make entries daily? A. No; it didn't follow that I made them once in ten days.

Q. Or once a month? A. Or once a month; but if there was a rush I was very apt to go in the back and work just as any other clerk; in a rush of business; I know that the Monday previous to the failure—we failed Wednesday—that I did considerable work in the back. 206

Q. You had a busy day then? A. Yes.

Q. And in order to get the things through you went back and took a hand? A. Yes.

REDIRECT-EXAMINATION BY COUNSEL FOR PLAINTIFFS:

By Mr. Hays:

Q. When you made any entries in the books were they correct entries? A. As far as I know, certainly, absolutely; I never put a false entry in a book in my life; not to my knowledge. 207

Q. Did you look at the books from time to time? A. Yes.

Q. And so far as you know, were they correctly kept?

Objected to because the witness has not shown sufficient knowledge of the books.

The Referee: So far as he knows.

208 Counsel for Defendant: He says he has looked at the books.

Q. I ask you so far as you know whether they were kept correctly?

Objected to.

Objection overruled.

Defendant excepts.

A. Yes.

Q. You were asked about the Morrison account by Mr. Larkin; that was quite a large account, was it not, owing to the firm, and subsequently to the
209 Trustees? A. Yes.

Q. It amounted to about $134,000. Do you remember that subsequent to the election of the Trustee a suit was brought against Morrison, or an effort was made by the Trustee to collect it?

Objected to as not the best evidence.

The Referee: He may say whether he knows it or not.

Mr. Larkin: If it is a fact, state it.

Q. Do you know?

Objected to as leading.

210 Objection overruled.

Defendant excepts.

A. I believe there was.

Q. Do you remember advising, as a member of the firm, with Mr. Ralph Wolf, as attorney for the Trustee, about the settlement of that account?

Objected to as immaterial.

Objection overruled.

Exception.

A. I do.

Q. Do you remember telling him to take $5,000 211
or anything he could get from that account? A. I remember telling him to take what he could get; that I considered $5,000 in cash was better than $10,000 in notes from him.

Q. And that was because you didn't think A. P. Morrison was any good financially?

Objected to as calling for a conclusion.

Objection sustained.

Question withdrawn.

RALPH WOLF, being duly sworn and examined as a witness for the plaintiffs, testifies: 212

By Mr. Hays:

Q. What is your profession? A. An attorney and counselor at law.

Q. And a member of the firm of Hays, Hershfield & Wolf? A. Yes.

Q. Upon the appointment of the Receiver in this Fiske Bankruptcy, were the firm of Hays, Hershfield & Wolf appointed attorneys for the Receiver and subsequently appointed attorneys for the Trustees? A. Yes.

Q. Did you have personal charge in acting as 213
counsel to the Receiver and as counsel to the Trustees? A. Yes.

Q. Did you make an examination into the affairs of J. M. Fiske & Company? A. Yes.

Q. Did you make an examination into the financial standing of the various debtors who appeared upon the books of the firm of J. M. Fiske & Company to be owing them money? A. Yes.

Q. In order to ascertain whether the amounts were collectible or not? A. Yes.

214 Q. When did you commence those efforts? A. Well, within a week of the 19th of January, 1910.

Q. Will you state what you did and what you ascertained with reference to any of the accounts which appeared upon the books of J. M. Fiske & Company?

Counsel for Defendant: Objected to, what he ascertained.

The Referee: What did he do?

Q. What did you do? A. All of the debtors, with possibly one or two exceptions, were subpoenaed pursuant to an order obtained for their ex-
215 amination under Section 21-A of the Bankruptcy Act, and were examined.

Q. By you? A. By me; some instead of being examined attended at our office, and I took their testimony there in the shape of an affidavit sworn to before a Notary Public.

Q. What did you ascertain with reference to the accounts of these various debtors?

Objected to.

The Referee: What they said is admissible.

A. I will take Mr. Felix first; he said that while
216 the books showed an apparent large indebtedness against him, that he denied that the transactions were for his account, but that they were really for the account of J. M. Fiske & Company; but that if they were for his account he was unable to pay them at all. Robert F. Little admitted the debt, stated to me that there were judgments on record against him, which I verified; that he had been examined in supplementary proceedings, which I verified; and he gave me a written admission of his liability; a suit was started against him and no answer was interposed. A. P. Morison was examined; he admitted that he owed the money

and said that he couldn't pay it; and finally the 217
firm of Morison Brothers, which, as I understand it, is composed of his brothers or some relatives, offered to pay $12,500 in the shape of notes running over a period of one year in settlement of a debt of $134,000, and a meeting of the creditors was called at which all of the creditors were notified of that offer, and it was accepted and approved by the Court.

Q. What did you do to ascertain whether he was good financially? A. I took his statement in my office, and according to his statement, he was absolutely uncollectible; there had been attachments 218
issued against him under which statements were made by the Sheriff of no property found; I communicated with the attorneys that obtained this attachment, and so far as I could ascertain, the claim was utterly uncollectible; there were other debts against Morison and he hadn't paid, or made any effort to pay, any of them.

By the Referee:

Q. Was judgment entered against Little? A. Yes.

Q. Was execution issued and the judgment satisfied? A. Not in our suit; in other suits; he has 219
been examined in supplementary proceedings.

Q. Marcus Schnitzer? A. I examined him and he admitted that he owed the money; suit was started and no answer interposed, and he has given me a statement that he is utterly unable and has been for a long time past utterly unable even to pay any portion of the account.

By Mr. Larkin:

Q. When you say "unable," did you make any inquiry to ascertain what property he had? A.

220 Well, so far as he could tell me he hadn't had any property for a long time past. Sullivan had disappeared for a long time. Efforts were made to find him, and I could find no trace of him at all until very recently we ascertained that he had been arrested in the raid on B. F. Scheftels & Company and was now out on bail, and from the information that I have obtained he was totally uncollectible. Harry L. Stevens, a former clerk of J. M. Fiske & Company, has given me his statement that he is totally uncollectible. The claims of Martha L. Stevens and Sarah L. Stevens, he says, while ap-
221 pearing nominally in their names pursuant to his directions, are his accounts; he has testified that they know nothing of the transactions at all, but that they were placed on the books in those names by his direction.

Q. Is that all? A. That is all. Lathrop Haskins & Company of course you don't want. Charles McLean; he practically admits that the debt is correct, but says that he has a claim for $5,000 against J. M. Fiske & Company for unpaid bonus on his salary; and it seems to me that that is more or less well founded.

Q. From your investigation of the facts? A.
222 Yes.

Q. What did you ascertain of his financial condition? A. He is a clerk employed on a salary.

Q. Do you know whether he has any property or not? A. Nothing except a small salary.

Q. Is there any other one there? A. No, that is everything except Lathrop & Haskins, which you don't wish. They went into bankruptcy the 19th of January, 1910; a Receiver was appointed on that day, and Trustees in Bankruptcy have since been appointed.

CROSS-EXAMINED BY COUNSEL FOR DEFENDANT: 223

By Mr. Larkin:

Q. This Stevens account; did you take Stevens' statement without any further verification, about the sister or whatever the other female customers were? A. Yes, he was examined in court before the Commissioner appointed under the order obtained by me for his examination.

Q. And you took his statement without communicating with the parties? A. An order has been obtained for their examination; they are non-residents of the State of New York and there is considerable difficulty in subpœnaing. 224

Q. So you take what he has told you without knowing whether it is true or not? A. No, I only know what he testified.

Q. I understand that your testimony has only been as to what was told you? A. It was sworn to by Mr. Harry L. Stevens.

Q. Yes; in the description of the other customers you have been merely testifying here as to what has been told you by these people? A. Yes, except where I gave other information. For instance, in the case of Mr. Little there were judgments of record against him, under which he had been examined in supplementary proceedings. 225

Mr. Larkin: Yes, you so stated.

Adjourned till to-morrow, 3 November, 1910, at 2 P. M.

226 NEW YORK, November 3, 1910.

Met pursuant to adjournment.

Present—The Referee;

Mr. Hays and Mr. Wolf for the plaintiffs;

Mr. Larkin and Mr. Garretson for the defendant.

MAX ISAACS, being duly sworn and examined as a witness for the plaintiffs, testifies:

227 By Mr. Hays:

Q. Where do you reside? A. 1440 Herkimer Street, Brooklyn.

Q. What is your business? A. Bookkeeper.

Q. For what firm at present? A. Alexander & Company.

Q. In January, 1910, whom were you bookkeeper for? A. J. M. Fiske & Company.

Q. How long had you been their bookkeeper? A. 5 years bookkeeper, with the concern 9 years.

Q. What books did you keep? A. Stocks and bonds.

228 Q. What books? Give their names. A. Ledger and stock blotter.

Q. Did you keep all the ledgers? A. No.

Q. Which ledger did you keep? A. The regular stock ledger and the customers' ledger.

Q. Is that here? A. No, it is not here.

Q. You kept the stock ledger, did you? A. Yes, and customers' ledger.

Q. Showing the dealings of the customers of Fiske & Company with the firm? A. Yes.

Q. And showing the stocks in their account? A. Yes.

Q. That was one book? A. Yes. 229

Q. What other book did you keep? A. Well, I run the clearing house blotter.

Q. And what other books besides that? A. The trial balance book.

Q. What other books? A. That is all.

Q. Were there any other books kept by J. M. Fiske & Company? A. A trial ledger that I know of.

Q. Was there a cash blotter? A. Yes.

Q. Who kept that? A. Mr. Humphrey.

Q. Was there a stock blotter? A. Well, there was the Clearing House blotter that we carried 230
stocks in.

Q. That was the one you kept? A. Yes, but there was the long and short book; the record of what the customers had on hand; that was kept by a man by the name of Harry Waller.

Q. And what other books that you know of that were kept there? Look at the books here on the table and tell me if you recognize any of them as the books of J. M. Fiske & Company? A. No; those are not our books.

The examination of the witness is suspended.

231

CLIFFORD M. WASHBURN, being duly sworn and examined as a witness for the plaintiffs, testifies:

By Mr. Hays:

Q. What was your business in January, 1910? A. Broker.

Q. With what firm? A. J. M. Fiske & Company.

Q. Were you a member of that firm? A. Yes.

Q. How long had you been a member of that firm? A. About 14 months.

Q. Were you the Board member? A. Yes.

232 Q. Your duties kept you on the floor of the Exchange, the Stock Exchange? A. Yes.

Q. Your firm was a member of the Stock Exchange? A. Yes.

Q. You were on the Stock Exchange floor every day? A. Yes.

Q. Were you there to execute orders for the firm? A. Yes.

Q. In the purchase and sale of stocks? A. Yes.

Q. Did you keep yourself familiar with the prices at which stocks were bought and sold while you were a member of the Exchange? A. Yes.

233 Q. I show you certain papers marked Plaintiffs' Exhibit 4 for Identification, and ask you if you know what those sheets are? A. Yes.

Q. What are they?

Objected to as immaterial, irrelevant.

The Referee: He can tell what the papers are.

Exception.

A. This looks like the official sales list of the Stock Exchange sales.

Q. How did you receive those slips, or did you receive slips from them every day? A. They were received in the office.

234 Q. By the firm of J. M. Fiske & Company? A. Yes.

Q. And every day? A. I think so, yes.

Q. From whom were they received? A. I don't know who published them; they were received with the sanction of the Stock Exchange.

Mr. Larkin: I move to strike out "with the sanction of the Stock Exchange."

Motion granted.

Q. Do you know whether these sheets which you have looked at are accepted by all stock brokers

and persons dealing in stocks from day to day, as 235
giving the prices at which stocks are sold on the Stock Exchange?

Objected to.

Objection sustained.

Exception.

Examination of this witness suspended.

FRANK O. ROE, being duly sworn and examined as a witness for the plaintiffs, testified:

By Mr. Hays:

Q. What is your business? A. Banker. 236

Q. Connected with what bank? A. The Mechanics & Metals National Bank.

Q. On January 19th, 1910, what was your business? A. Banker.

Q. Connected with what bank? A. The Mechanics National Bank.

Q. The Bank at that time was the Mechanics National Bank, and was it afterwards changed to The Mechanics & Metals National Bank? A. Yes.

Q. That is its present name? A. That is its present name, its name now.

Q. But January 19th it was the Mechanics 237
National Bank? A. Yes.

Q. You were then cashier of it? A. Yes.

Q. What office do you hold now? A. I am one of the Vice-Presidents.

Q. How long had you been cashier? A. 6 years

Q. The Mechanics National Bank had an account with the firm of J. M. Fiske & Company, did they not? A. Yes.

Q. You have the books of the bank here? A. Yes.

Q. Will you look at the books and tell what

238 amount was to their credit on the morning of the 19th of January, 1910? A. Yes.

Q. Perhaps you have some memorandum from which you can refresh your recollection? A. (Reading from ledger) $36,239.47.

Q. On the morning of the 19th of June, 1910, did you receive a request from J. M. Fiske & Company to make them a loan of $400,000? A. I received such a request.

Q. Have you got it here?

It is produced.

It is offered in evidence and is marked
239 Plaintiff's Exhibit 4 of 3 November, 1910, A. S.

[Printed herein at p. 379.]

Q. Who received this request, Exhibit 4, in the bank, do you know? A. Mr. Robinson.

Q. What is he? A. Assistant cashier. He is in charge of the Loan Department.

Q. Was a credit made upon the books of the bank to J. M. Fiske & Company of $400,000? A. Yes.

Q. Thereafter were any deposits made by J. M. Fiske & Company? A. They deposited $54,048.18.

240 Q. Was that in checks of other people or J. M. Fiske & Company's check? A. I didn't see the check, but——

Q. Well, if you know now; I am willing to take whatever you say about it. A. There was a regular deposit made by J. M. Fiske & Company.

Q. Not their own check? A. No.

Q. Do you know when they were deposited; what time? A. I can't testify as to the exact time.

Q. Can you testify about the time? A. In the neighborhood of 12 o'clock.

Q. Prior to 12 o'clock had any checks been deposited in that account? A. No.

Q. The only thing that had been done was to give them credit for the $400,000? A. That is all. I will correct my testimony, that there may have been a deposit before 12; that was the first deposit received, that was $54,048.18; my recollection is that it came in just prior to 12 o'clock. 241

Q. On the morning of the 19th of January, 1910, were any checks of J. M. Fiske & Company certified by the Bank? A. Yes.

Q. To what amount? A. $276,697.67.

Q. And that was before 12 o'clock? A. That was before 12 o'clock.

Q. Your bank had been doing business with J. M. Fiske & Company for some time previous to the 19th of January? A. Yes. 242

Q. Do you remember for how long? A. I don't remember how long.

Q. Well, for about how long? A. Several years.

Q. Were similar requests made on other days prior to January 19th, for loans in sums of $400,000 or $500,000? A. Yes.

Q. And loans were credited to them for those amounts? A. Yes.

Q. And at the close of the day were those loans paid by J. M. Fiske & Company? A. Yes.

Q. How? A. By either sending in the securities or making deposits or paying them off with their own check at the end of the day. 243

Q. Will you state any instance when they sent in any securities, and where they didn't pay loans off on the same day by check drawn on their account in your bank? A. They would send securities in and deposits which were placed to their credit, and then use their own check to cancel the obligation of the morning.

Q. You mean that they made deposits during the

244 day and sometimes they deposited securities with you? A. Yes.

Q. Where are those securities entered, in which book? A. In the Loan Department Book.

Q. Have you got the Loan Book here? A. Yes.

Q. Will you turn to that loan book? A (Reading from loan book) They sent securities to the bank on January 18th, 1910, 200 U. S. Steel, 10 Sloss Sheffield, 10 Chicago & Alton.

Q. Was a loan made against them? A. Yes, a loan of $15,000.

Q. So they sent over the securities which you
245 have named on that day and you made them a loan of $15,000 against it? A. Yes.

Q. But in the morning of the 18th you had made them a loan of $500,000, had you not? A. Yes, $500,000.

Q. That was on a request similar to the request shown as Plaintiffs' Exhibit 4? A. Yes.

Q. And at the close of the day on January 18th they paid that loan by a check which I now show you, did they not? A. Well, you show me a check to our order for $500,000; I suppose it would liquidate it; that check is not identified in the book.

Q. Is there any doubt but what this was to pay
246 off the loan? A. I don't think there is any doubt about it.

The check is offered in evidence.

It is marked Plaintiffs' Exhibit 5 of Nov. 3, 1910, A. S.

[Printed herein at p. 380.]

Q. Do you find any other instance where they deposited securities with you? A. January 7th (referring to ledger), 100 Wabash preferred and 20 U. S. Steel.

Q. And that was against a loan of how much? A. $5,000.

Q. In each of the cases which you have men- 247
tioned, the 18th of January and this one of the 7th of January, the securities were brought to and delivered to the bank, were they not? A. Yes.

Q. And then a loan was made, in one case $15,000 and in this case of how much? A. $5,000.

Q. And do you find also that of the 7th of January, 1910, the bank made a loan to J. M. Fiske & Company of $400,000 upon a request similar to the one shown on Plaintiffs' Exhibit 4? A. Yes.

Q. And that loan was paid off on the 7th of January at the close of the day by a check which I now show you, was it not? A. Yes. 248

The check is offered in evidence.

It is marked Plaintiffs' Exhibit 5^A of 3 Nov. 1910, A.S.

[Printed herein at p. 380.]

Mr. Hays: It is endorsed the same as the other check, January 7, 1910.

Q. Now, will you kindly tell us whether you find by consulting the books any case where, when these loans were made, as I have called your attention to, and as indicated by Plaintiffs' Exhibit 4, this request, any securities were delivered to the 249
bank in payment of the loans? A. The securities were delivered to the bank, and a credit given to their account so as to make their account of sufficient value to draw the check to pay off their loan request of the morning.

Q. Will you kindly tell me, referring to your book, any instance where any securities were given to the bank in payment of the loans thus made daily, pursuant to Plaintiffs' Exhibit 4? A. Securities are given to them in the form of a loan to make their account good, so that they can draw their check to pay off the request of the morning.

Q. Show me any entry on your books where any

250 such securities were delivered to the bank in the case of these loans made in the morning? A. These securities are delivered to the bank in the shape of a loan, so as to give them sufficient balance in their account to pay off their indebtedness credited in the morning by their loan obligation.

Q. Turn to your books and show me any case where the securities were delivered to the bank, other than in the specific cases you have mentioned; can you? A. I think I have explained to you how the transactions are made; if their account is not good in the afternoon to a sufficient value to pay off their obligation of the morning the securities
251 are sent around; that is, they make a loan for a certain amount to make their account good, or they send deposits and then they draw their check, which is charged to their account to eliminate their request of the morning.

Q. These two loans of $400,000 and $500,000 were paid off, and the account was made to show entries that were made in the books. Show me any that shows the receipt of any securities except those that you have mentioned? A. Well, those that I have mentioned were evidently sent around——

252 Q. Never mind that. A. Well, they were sent around to increase their balance so as to make it sufficient to pay off that loan.

Mr. Hays: I move to strike out the answer.

The Witness: I will say they were sent around—

Mr. Hays: I move to strike out "That they were sent around for that purpose."

Motion granted.

Q. Turn to the books and show me the entry in the books of any securities that were received? A. There are no entries.

Q. In the two particular cases which you have 253
mentioned securities which you have stated were delivered to the bank, a loan was made on those securities? A. Yes.

Q. I think you told us how long they had been doing business with the bank, did you not? A. I did not.

Q. Well, about how long to your knowledge? A. Several years.

Q. Will you look at your books and see when the loan of $15,000 of the 18th of January was paid? A. (Referring to book). It was paid on the 19th.

Q. How was that paid on the 19th? By check? 254
A. Yes, I suppose so; I didn't receive the check.

Q. Well, then you don't know of your own knowledge? A. No.

Q. On the morning of the 19th of January did you hear anything with reference to the firm of J. M. Fiske & Company? A. I heard rumors about them.

Q. Where did you hear the rumors? A. I was in the Receiving Teller's cage and one of the clerks in that department told me that they had heard rumors about this firm.

Q. Who was the clerk that told you that? A. 255
Well, I don't remember which clerk told me.

Q. You have a ticker in the office of the bank? A. Yes.

Q. Connected with the Stock Exchange? A. Yes.

Q. And that ticker records the doings on the Stock Exchange in relation to sales and purchases of stock? A. It records the transactions, I believe.

Q. You also have a news ticker there? A. No.

256 Q. Who was the clerk who told you there was a rumor about the firm? A. I don't remember which clerk it was.

Q. Did he tell you he heard the firm was in trouble? A. I don't remember the words he used, but he gave me the impression that they were talked about.

Q. Well, do you remember being examined in the bankruptcy proceedings? A. Yes.

Q. And that was about the 13th of May last? A. Yes.

Q. Do you remember being asked this question
257 (page 13):

> "Q. What was the occasion of your going to see Mr. Sherwood of J. M. Fiske & Company to obtain this collateral? A. There was a great disturbance in the Stock Market that morning and I had heard there was some trouble on the Stock Exchange, and I learned that it was rumored at least that J. M. Fiske & Company were in trouble, so I went around there."

Do you remember that? A. Yes.

258 Q. So that you are now able to tell that this clerk told you that the rumor was that they were in trouble on the Stock Exchange? A. I heard rumors about them.

Q. Well, I know; but the rumor was to the effect that they were in trouble on the Exchange, was it not?

Objected to as calling for a conclusion.

The Referee. The effect on the witness's mind.

A. Yes.

Q. Will you please tell us now your best recollection of what this clerk told you? A. I don't

remember the words he used, but he gave me the 259
impression that there was something wrong with the firm of J. M. Fiske & Company.

Q. In what way wrong? A. That they were being talked about.

Q. In what way? Financially wrong, or wrong about their character or what?

By the Referee:

Q. Something about their financial standing? A. About their financial standing.

By Mr. Hays:

Q. You can't remember which clerk it was? A. 260
No, I don't remember which clerk it was.

Q. Have you tried to find out since I examined you on the 13th of May? A. I asked in the Receiving Teller's Department which clerk it was, yes.

Q. And did you find out? A. One of the clerks told me that he told me.

Q. Do you know his name? A. Yes.

Q. What is his name? A. His name is Clark.

Q. What is his first name? A. George Clark.

Q. And he is in the Receiving Teller's Department there? A. Yes.

Q. And he is there now? A. Yes. 261

Q. What did you do after you heard that rumor? A. I gave instructions not to make any more payments.

Q. Who did you give the instructions to? A. The certification department and the paying teller and the receiving teller.

Q. You told the paying teller not to pay any more checks of J. M. Fiske & Company? A. Yes.

Q. And the certification clerk you told not to certify any more checks of J. M. Fiske & Company? A. Yes.

262 Q. And you did that immediately upon hearing this report from the clerk in the Receiving Teller's Department? A. The first thing I did was to find out how much they had drawn.

Q. And you found that out? A. Yes, and then I gave instructions not to pay any more until they heard from me.

Q. And also not to certify any more checks? A. Not to certify any more checks.

Q. Then what did you do immediately after you gave those instructions? A. I walked around to J. M. Fiske & Company's office——

263 Q. One moment——

Mr. Larkin: Let us have all the answer.

Q. You went around to J. M. Fiske & Company's office? A. Yes, I went around to J. M. Fiske & Company's office and asked for Mr. Sherwood, and saw Mr. Sherwood——

Q. One moment; I don't ask what happened there.

Mr. Larkin: I think we are entitled to that answer.

The Referee: That is an answer; he is entitled to stop him.

264

Exception.

Q. Did you speak to anybody in the bank before you went to the office of J. M. Fiske & Company? A. Yes.

Q. Whom did you speak to in the bank? A. One of the other officers.

Q. Which officer? A. Mr. Knowles.

Q. What was he? A. vice-president.

Q. What did you say to him?

Objected to as incompetent and immaterial to this issue.

The Referee: I think it is material. 265

Defendant excepts.

A. I told Mr. Knowles what I had heard. I told him that I heard the firm of J. M. Fiske & Company were being talked about.

Q. What else did you tell him? A. I don't think I told him anything else.

Q. Did you ask any instructions from him? A. No; we consulted about the matter for a few minutes, and I went around to J. M. Fiske & Company's office.

Q. To go back a moment, Mr. Roe. When the clerk in the Receiving Teller's Department gave you this information that you say he did, did you make any further inquiry of him as to where he had learned it? A. No. 266

Q. Did he tell you how he had learned it or where he had learned it? A. No.

Q. Did he give you any other information other than what you have stated? A. No.

Q. And you asked no questions of him to ascertain how he had learned the fact? A. No, because when there is a disturbance on the Stock Exchange it is quite customary to hear rumors of lots of firms, you know. 267

Q. And you made no inquiries of him further than you have stated? A. No; hearing a rumor of a firm that kept an account with us, of course I investigated the matter further.

Q. What investigation did you make further before you went around to J. M. Fiske & Company? A. I asked how much they had drawn.

Q. And that is the only investigation that you made? A. That is all.

Q. I call your attention to your testimony given on the 26th day of May, 1910 (page 69), in which

98

268 you were questioned about what you said to Mr. Knowles, and in answer to the question

"Q. What did you say to Mr. Knowles?" you gave the answer.

"A. I told him that I had heard that J. M. Fiske & Company were in trouble and I would go around and see Mr. Sherwood."

Q. That is all? A. That is all."

Q. Is that right? A. As far as I can recollect, that is correct.

Q. (Reading from testimony on p. 69):

269 "Q. What did he say? A. I did not give him any time to answer.

Q. You were in a hurry? A. Yes.

Q. You wanted to make time? A. Yes.

Q. You wanted to get this account secured just as quickly as possible? A. Yes, Sir."

Q. Do you remember that? A. Yes.

Q. Is that true? A. Yes.

Q. So after learning that the firm were in financial trouble and speaking to Mr. Knowles and directing the paying teller not to pay any more checks, and the certification clerk not to certify
270 any more checks, you immediately rushed over to the office of J. M. Fiske & Company?

Mr. Larkin: I object as characterization of the testimony, assuming a state of facts not proved.

Question withdrawn.

Q. The next thing you did was after speaking to Mr. Knowles to go over to the office of J. M. Fiske? A. Yes.

Q. Had you ever been over to their office before? A. No.

Q. During all the time you were connected with the bank? A. No.

Q. Did you go over in a hurry? A. I didn't lose 271
any time getting over there.

Q. When you got over there what time was it? A. Well, in the neighborhood of noon.

Q. 12 o'clock do you mean? A. In that neighborhood, yes.

Q. Can you remember whether it was before or after 12? A. I can't remember the time; I didn't make a note of the time.

Q. But do you remember whether it was before or after 12 o'clock? A. I think it was before 12 o'clock.

Q. How much before 12 o'clock? A. I don't 272
remember how much before 12 o'clock.

Q. Well, give us some idea? A. Well, it is only a conclusion that I can draw.

Q. I want your best recollection. A. My best recollection is that it was somewhat before 12 o'clock.

Q. Has anything occurred since the time you were examined before to refresh your recollection on the subject of the time? A. Yes.

Q. And what is it? A. Well, one or two of the clerks aided me in refreshing my recollection that it was prior to 12 o'clock.

Q. Who were the clerks? A. The receiving 273
teller and the certification clerk.

Q. And after talking with them can you tell us how long before noon it was, before 12 o'clock? A. Well, I believe it was shortly before 12.

Q. Within 5 or 10 minutes, do you mean, or longer? A. That or more.

Q. How much more? A. Well, it is rather hard for me to tell.

Q. But you say you have refreshed your recollection by talking to the clerks, and I call your atttention to the fact that when you were examined

274 in May you fixed it around 12 o'clock; you said somewhere around noon? A. That is correct.

Q. Well, you stick to that now? A. It was about that time, yes.

Q. Where was the office of J. M. Fiske & Company? A. It was on Broadway.

Q. What number? A. I think it was No. 42.

Q. Where was the Bank? A. 33 Wall Street.

Q. When you got over to the office of J. M. Fiske & Company whom did you see? A. Mr. Sherwood.

Q. Anybody else? A. No.

Q. Where was Mr. Sherwood? A. Mr. Sher-
275 wood was in the office of the firm.

Q. What did you say to Mr. Sherwood? A. I told him that I had heard some rumors of their firm, and that they had not made a deposit yet, and he told me that there was a deposit on the way around; and I told him I thought he had better give me some securities, which he did.

Q. Did you tell him that you heard the firm were in trouble on the Stock Exchange? A. I told him I heard some rumors about the firm.

Q. Did you tell him that the claims were that they were in trouble? A. I told him that I had heard rumors about the firm.

276 Q. Did you tell him that you had heard rumors that the firm were in trouble? A. I don't remember the words that I used at that time.

Q. Well, give me the substance of the words. A. I have given it to you.

Q. I call attention to question and answer on page 15 of your testimony, taken on the 13th of May, 1910:

> "Q. Did you tell Mr. Sherwood why you had come over, that you had heard rumors about Fiske & Company? A. I told him that, yes.

Q. Heard they were in trouble? A. I heard such rumors I told him, and he gave me the collateral; there was very little said." 277

Do you remember that now; does that refresh your recollection that you had heard rumors about Fiske & Company? A. Well, if that is on the record that way I believe it to be correct.

Q. (Reading from testimony):

"Q. What did Mr. Sherwood say to those rumors? A. He didn't give me a positive answer."

278

Do you remember that? A. That is correct.

Q. (Reading from testimony):

"Q. Did you ask him——. A. I told him I heard some rumors that they were in trouble, and I told him I wanted some additional collateral to his loans, and he got them for me and gave them to me, and I came back with them."

Did you testify to that? A. I have no doubt that the record is correct.

Q. I am reading from the record and your counsel has a copy of it; I read it for the purpose of refreshing your recollection. That is correct, is it? A. Well, I have no doubt that your record is correct, certainly. 279

Q. Well, if I am reading correctly from the record, what I want to know is whether that testimony was correct? A. Well, it must be if it is there.

Q. (Reading from testimony):

"Q. What did he say when you told him you had heard rumors about his firm being in trouble? A. Did he say it was true or un-

280 true or did he make an evasive reply? A. I should say an evasive reply."

Do you remember that? A. Yes.

Q. Is that true also? A. Yes.

Q. (Reading from testimony):

"Q. Didn't you insist on a definite answer to that question? A. No, I insisted on getting some securities."

Is that correct? A. That is correct.

Q. On page 16 I asked you to

"Q. Tell us everything you now recall that
281 Mr. Sherwood said and did."

And you answered:

"A. Mr. Sherwood—I saw Mr. Sherwood —I went into the office of J. M. Fiske & Company, and saw Mr. Sherwood and told him I had heard some rumors about their being in trouble, and I thought he ought to give me additional security to their loans. They had certified considerable that morning, and he had not yet made a deposit. He told me there was a deposit on the way around, and
282 he thereupon gave me the additional securities, a list of which I have just read."

Is that correct? A. Yes.

Q. When he told you that a deposit was on the way around to the bank did, he tell you how much? A. No.

Q. Did you ask him how much? A. I don't remember whether I did or not.

Q. You remember being asked about that on the examination in May, do you not? A. No, I don't remember that.

Q. Have you tried to refresh your recollection as

to all that was said at this interview that you had with Mr. Sherwood on the 19th of January? A. Yes. 283

Q. Having been examined once about it in May and being examined again to-day, and having tried to refresh your recollection, can't you tell us now what your best recollection is as to what you said when he told you that a deposit was on the way to the bank? A. I don't remember what he said.

Q. You didn't ask him how much it was? A. I don't remember about asking him.

Q. I read from your testimony on page 17:

> "Q. When he told you that a deposit was on the way to the bank, wasn't that all you required—that they should make a deposit, or did you require securities?" You said you could not answer it, and I ask you why? 284
>
> "A. Because I didn't know what the amount of the deposit was.
>
> Q. Didn't you ask him? A. No."

Does that refresh your recollection? A. Well, I have just answered the question; I said, "I don't remember"; my recollection might perhaps have been better then than now.

Q. In May you said you didn't ask him? A. Well, I have no doubt that it is correct; I don't remember now whether I did or not. 285

Q. How long were you there talking to him? A. Two or three minutes.

Q. You went around there principally to get the securities, didn't you? A. Yes, sir.

Q. And the minute you got them you wanted to get out and get back to the bank? A. As soon as I got the securities I started back.

Q. And that was your idea when you went there,

286 to get them and get back to the bank as quickly as possible?

Objected to as incompetent and immaterial.

Objection overruled.

Exception.

A. Yes, sir.

Q. So you didn't wait long to have much conversation with Mr. Sherwood? A. I had very little conversation with Mr. Sherwood.

Q. You didn't press Mr. Sherwood for an answer to the question as to whether they were in
287 trouble, did you? A. No, sir.

Q. Do you know what time you got back to the bank? A. I think it was in the neighborhood of 12 o'clock, or shortly after.

Q. Is there any way of fixing that time? A. No, I made no record of the time at all.

Q. That is true; but, then, in view of the interest that we have taken in this interview you had with Mr. Sherwood and your examination, have you done anything to refresh your recollection so as to fix the time? A. No, sir.

Q. You know about the time that J. M. Fiske & Company suspended; you have heard it since?
288 A. Yes, sir.

Q. You know it was about 12.40? A. Yes, sir, I have heard.

Q. And you had known that for some time prior to this examination? A. Yes, sir.

Q. Now, can't you tell us about how long before 12.40 you got back to the bank? A. I think I must have got back to the bank a few minutes after 12.

By the Referee:

Q. How long would it take you to go from your bank to 42 Broadway? A. I should think about a little over 5 minutes. 289

By Mr. Hays:

Q. Where was J. M. Fiske & Company's office? A. It might have been 10 minutes; 5 or 10 minutes; their office was at 42 Broadway, I think.

Q. Getting from the bank office over to the office of J. M. Fiske & Company, upstairs? A. Yes, sir; about 5 or 10 minutes.

Q. You don't think it would be less than 10 minutes to go up in the elevator and all? A. I would have to try it to see. 290

Q. And the same time coming back; 5 minutes? A. I don't think there ought to be any difference between the time going and coming.

Q. You were in a hurry; you didn't lose any time? A. I didn't lose any time; certainly not.

By the Referee:

Q. You were in the office about how long? Five minutes? A. I was in there less than 5 minutes.

By Mr. Hays: 291

Q. When Mr. Sherwood said he would give you securities, what did he do? A. He consulted with another gentleman who was in the office, and handed them to me.

Q. Well, he got the box, told this other clerk to get the box? A. I don't know whether he got them from the box or not; he took them from the office there.

Q. He sent to a clerk there, did he? A. I think it was one of the partners.

292 Q. Mr. Humphrey? A. Mr. Humphrey, yes.

Q. Did you hear what he said to Mr. Humphrey? A. No, sir.

Q. What did Mr. Humphrey do after Mr. Sherwood spoke to him? A. He gave him the securities and Mr. Sherwood handed them to me.

Q. Where did Mr. Humphrey get them from? A. From the office, inside; in the cage.

Q. Did you see him go to the cage? A. Yes, sir.

Q. There was a clerk there in the cage who had charge of the securities? A. Mr. Humphrey, I
293 think.

Q. So he went into the cage and got them, did he? A. Yes.

Q. Did he come into the office where you and Mr. Sherwood were talking? A. It was in that office.

Q. Oh, it was all in that office? A. Yes.

Q. But was there a cage in which Mr. Humphrey was separated from where you were? A. Yes, sir; I believe so.

Q. So he just spoke to him through the wire of that cage? A. Yes, sir.

Q. And then Mr. Humphrey got those securities, and I asked you whether you saw where he got
294 them from? A. No, I didn't see where he got them from.

Q. But he handed them to you, or to Mr. Sherwood? A. He handed them to Mr. Sherwood and Mr. Sherwood handed them to me; I spoke to Mr. Sherwood; I didn't have any conversation with Mr. Humphrey.

Q. Did you examine the securities at the office? A. I just glanced over them and put them in my pocket.

Q. Did you make any list of them? A. I didn't list them up in that office, no, sir.

Q. You didn't examine the securities at J. M. Fiske & Company's office; you didn't undertake to do that? A. No. 295

Q. Let me refresh your recollection; on page 72 of your examination on May 26th you gave this testimony:

"Q. Did you examine, at the office of J. M. Fiske & Company, the securities which Mr. Sherwood gave you? A. No, sir.

Q. Took whatever he gave you? A. Yes, sir.

Q. Glad to get them? A. Yes, sir.

Q. And immediately upon getting them you hurried over to the bank again? A. I went directly back to the bank." 296

That is correct, is it not? A. Yes, sir.

Q. When you got back to the bank, what did you do. A. I turned over the securities that I had received from Mr. Sherwood to Mr. Robinson, the assistant cashier in charge of the loan department, and instructed him to list them up.

Q. And he immediately listed them up, did he? A. Yes, sir.

Q. I show you a list (producing paper to witness): Look at it. A. Yes, sir. 297

Q. Is that the list of the securities? A. Yes, sir; that is the list of the securities that I received.

Q. And that list which I just showed you was furnished me by you, was it not? A. Yes, sir; that is the original list.

Mr. Larkin: It is a copy of the original list, you mean?

The Witness: The original document I gave him; the original document that was handed to Mr. Hays at the bankruptcy proceedings.

298 Q. And the figures which appear upon this list in pen and ink in the last column, will you kindly tell us what those figures mean? A. That is the amount that the securities were sold for.

Q. Afterwards? A. Yes, sir.

Q. By the bank? A. Yes, sir.

Q. Making a total of $175,647.45? A. Correct.

Q. And that represents the total amount realized by the bank subsequently from the sale of these securities which you received on the 19th of January, 1910, from Mr. Sherwood? A. Yes.

Q. The other figures and items on this paper
299 represent a description of the securities you received, and their numbers? A. Yes, sir.

The list above referred to is offered in evidence.

It is marked Plaintiff's Exhibit 6, 3d November, 1910, A. S.

[Printed herein at p. 381.]

Q. Besides directing the loan clerk to list the securities which you brought back from the firm of J. M. Fiske & Company, what other directions did you give him? A. I don't remember of any other directions just at this moment.

300 Q. Did you direct him then to fill out the value of the collateral? A. Well, that is a part of his listing of securities, listing and extending the collateral, perhaps I should have said in my previous answer.

Q. So that the direction was to list them and fill out the value of the collateral? A. Yes, sir.

Q. After the assistant cashier who had charge of the loans had listed the collateral and filled out their value, what was done in the bank with reference to this account? A. The account on the ledger was balanced.

Q. You gave no directions to the paying teller to pay checks of J. M. Fiske & Company? 301

Objected to as leading.

Q. Did you give any directions to the paying teller to pay J. M. Fiske & Company?

Objected to as leading.

A. I instructed the tellers not to pay anything more.

The Referee: Ask him whether he gave out any further directions.

Defendant excepts.

Q. Did you give the paying teller any other directions when you got back, about paying checks? 302
A. No, sir.

Q. Did you give the certification clerk any other directions about certifying checks? A. No, sir.

Q. But you proceeded, as I understand you, to make up the account? A. Yes, sir.

Q. For the purpose of closing up the account? A. For the purpose of finding out how the account stood.

Q. Who made up the account for the purpose of finding out how it stood? A. The bookkeeper and the loan department.

Q. How did you find the account stood after it 303
was made up? A. That it needed $242,201.57, to balance.

By the Referee:

Were these securities sold on that day? A. No, sir.

By Mr. Hays:

Q. You put values on them according to the market value as shown by the daily sales? A. That didn't affect the ledger balance, you know.

304 Q. You had the securities listed and some values put upon them? A. Yes, sir.

Q. The values that were put upon them were taken from the stock quotations of the daily sales, were they not? A. They were taken from the ticker.

Q. And having got those values you then proceeded to balance the account? A. I balanced the account irrespective of those values.

Q. First you valued the ledger accounts, irrespective of the securities? A. Yes, sir.

Q. And you found that they owed the bank how
305 much, irrespective of the securities; if you balanced the account? A. $242,201.57.

Q. Then what did you do with the securities; did you hold them against J. M. Fiske & Company? A. Held them as additional collateral to the other loans they had.

Q. Do I understand right that the whole amount of their indebtedness at that time, after balancing their account was $242,201.57? A. Yes, sir.

Q. That being the entire amount of the indebtedness, you held these securities as collateral to that indebtedness? A. Well, I didn't hold that collateral to any one indebtedness; we considered all the loans
306 one loan, and the collateral one lot of collateral; we didn't separate collateral as applying against any particular loan; and all the loans were made under one general loan, you know.

Q. But you say the total amount of the indebtedness was about $242,000? A. That is the ledger account.

Q. And that they had drawn $242,000 more than——

The Referee: But there are other loans besides that?

The Witness: The loans were as a separate item.

The Referee: And against those other loans you held other collateral; for that loan you had collateral? 307

The Witness: Well, we didn't hold collateral separately for each loan; we had other collateral besides this collateral, yes, sir.

Q. You had two other loans at that time with J. M. Fiske & Company, did you not? A. I believe so; I haven't the records here; I have no doubt you are correct, though.

Q. You had one loan on the 19th of November, 1909, of $50,000? A. That is correct.

Q. And against that you held certain securities which were delivered to you on the date of the loan? A. There were certain securities delivered at that time. 308

Q. Which you held against that loan? A. Yes, sir.

Q. And those securities you have a list of there, have you not? A. No, sir.

Q. Well, I have a list of them here. Will you identify them from your book and tell me whether this list is correct? A. I shouldn't wonder; I don't think there is any question as to what they are.

Mr. Larkin: I move to strike out the answer and this testimony on the ground that it is irrelevant to these issues; there is no claim under the pleadings for any such securities. 309

Mr. Hays: We don't claim any of those.

The Witness: This list is not correct; there has been some substitution in the original loan from the time it was made.

Q. Was this the original loan? A. No, sir.

Q. You will furnish me with a list which I can put in the record of the securities that were in that loan? A. Yes, sir.

310 Q. And those securities were delivered to the bank and in the possession of the bank all the time from November 19, 1909, until they closed out the loan, were they not? A. I don't believe so, because I think there were some substitutions made.

Q. The original securities which were delivered, or other securities which were substituted in their place were in the possession of the bank from the time the loan was made until it was paid off? A. Yes, sir.

Q. So that that loan was made against specific securities? A. Yes, sir.

Q. There was another loan of $5,000 on Decem-
311 ber 15, 1909, made against 100 Pacific Mail and 100 Boston Copper, was there not? Yes, sir; that is correct.

Q. And those securities which I have mentioned were delievered to the bank at the time the loan was made, and were held by the bank against that loan? A. Yes, sir.

Q. Were there any other loans on the 19th day of January outstanding, in addition to the $50,000 loan of November 19 and the $5,000 loan of December 15, and the $15,000 loan that you spoke of as being made on the 18th of January, and the $400,-
312 000 loan that was made on the 19th of January? A. The $15,000 loan was paid off.

Q. It had been paid off? A. Yes, sir.

Q. With the exception of the $50,000 and the $5,000 loan and the $400,000 loan made on the 19th of January, was there any other loan outstanding? A. There was a loan of $242,201.57, that we have just mentioned, that was put through.

Q. This loan of $242,201.57 was ascertained by you when you came back with the securities, it being the amount of the balance owing by the firm of J. M. Fiske & Company to the bank? A. Yes, sir.

Q. And when you found that to be the amount 313
which they owed you, what did you do with the $100,000 loan that you had made them in the morning, or given them credit for in the morning? A. We gave them credit in the morning for $400,000, and they had drawn $276,000 against that, and with the debits and credits of the ledger left them $242,201.57 in our debt, which was practically balancing the $400,000 loan in the morning, which was the balance which was not covered; they gave us securities, and they made deposits against that $400,000, but on balancing the account we found it was $242,201.57 short, so we put a loan through for that 314
amount.

Q. On this morning of the 19th you have told us what occurred; the loan of $400,000 was credited to them? A. Yes, sir.

Q. Then checks were certified up to the amount which you had given against the account? A. Yes, sir.

Q. You have told us the amount that was in their account? A. Yes, sir.

Q. Then you heard these rumors and you went over to the firm of J. M. Fiske & Company and got these securities; then you came back and had the securities listed and the values put against them? 315
A. Yes.

Q. Then you closed up the ledger account and then they were indebted to the bank in the sum of $242,000. Now, up to that time had you had any conversation with any member of the firm of J. M. Fiske & Company with reference to that account on that morning, January 19? A. No; the only conversation I had was with Mr. Sherwood.

Q. And you have detailed that? A. Yes.

Q. And you had no other conversation with any member of the firm? A. No, sir.

316 Q. When you ascertained this indebtedness of $242,000 odd you made some entry in your books with reference to the $400,000 loan, did you not? A. Yes, sir.

Q. What entry did you make? A. Why, that loan was cancelled.

Q. What entry did you make? A. I made a debit of $400,000.

Q. That, by way of a bookkeeping entry, wiped out the loan, did it not?

Objected to as calling for a conclusion.

Question withdrawn.

317 Q. On one side of your book you had a credit due them of $400,000, which you had made in the morning? A. Yes, sir.

Q. And after this list of securities was made up and you balanced up the account, you put a debit item of $400,000 on the same account? A. Well, we put——

Q. That is what you did? A. Yes, sir.

Q. As I understand it, you state that you put a debit entry in the account of $400,000? A. $400,000—

Q. I didn't ask you anything more than that.

318 And then after you had made that debit entry you entered the item of $242,201.57? A. They were both made at the same time.

Q. Made at the same time then as you made the debit entry, you made the entry to their credit of $242,201.57 at the same time in their account, did you not? Did you make such an entry? A. The bookkeeper.

Q. That closed the account, did it not? A. Yes, sir.

Q. And how soon after you returned was that done; immediately? A. I don't remember how long

before that was done; it took some time to list up 319
those securities.

Q. Well, you started right in at this when you got back to the office, did you not? A. Yes, sir, but it took quite some time to get those accounts all balanced.

Q. The listing of the securities had nothing to do with closing the ledger account? A. No, sir.

Q. You gave directions when you got back to ascertain the balance, debit or credit, in the ledger account? A. Yes, sir.

Q. And it was immediately done, was it not? A. Yes, sir, it was immediately done.

Q. And ascertained? A. Well, it wasn't im- 320
mediately ascertained, no sir; it was immediately done; it took some time; sometimes it takes a check three or four hours to go through and get to the ledger; if it comes through the exchange in the morning it may reach the institution at eleven o'clock, but it may be twelve o'clock before it gets through the departments and is charged on the ledger.

Q. I am asking you as to this specific account; when you found that this debit balance against them was $242,000 I mean? A. I couldn't answer that.

321

Q. Well, how soon after twelve o'clock? A. I couldn't tell you.

Q. Give us your best recollection? A. Well, I don't know; I should rather have you ask some of the bookkeepers that know what time that account was balanced.

Q. Who is the clerk in the bank who would know about that? A. I think we should have to find from our records the name of the bookkeeper that was on the ledger at that time; perhaps his recollection would serve to give you the information.

322 Q. But as I understand it, you gave the directions immediately on coming back from J. M. Fiske & Company, did you not?

The Referee: He has said so.

Q. I will refresh your recollection with reference to this matter by testimony given by you at the hearing on May 26th; (page 74):

"Q. You mean that a statement was made up showing the amount that they had drawn against their account, and the deposits that they had made, and the difference of $242,-
323 201.57 was made as a credit? A. They took out $276,000, and the $400,000 that had been credited to them in the morning was—we cancelled the credit of $400,000.

Q. How did you cancel it? You used the word cancelled—what did you do? A. We charged the account in accordance with the agreement on file and put through a credit of $242,000, which was all they needed to balance the account—which was the amount they needed to balance the account.

Q. Now, in order to make this plain, let us see what you actually did, leaving out
324 the agreement, which takes care of itself, when you got back to the bank? You took these securities and had them listed and the valuation of them put down by the clerk, according to the market that day? A. Yes, sir.

Q. You then ascertained how much had been drawn? A. Yes, sir.

Q. By J. M. Fiske & Company? A. Yes, sir.

Q. You found that there was $242,201.57 over and above what they had drawn? A. Yes, sir.

Q. And you then credited that back on your books, as appears on this Exhibit No. 2? A. That is correct." 325

(referring to an exhibit that was produced by you showing the state of the account with the bank on the hearing before the Referee). You remember all that testimony, do you not? A. Yes.

Q. And that is true as I have read it to you? A. Yes, sir. I remember it; I think it is true; yes, sir.

Q. (Reading from testimony):

"Q. And on the debit side of the account you also put the $400,000? A. Yes, sir. 326

Q. You say that was done immediately after you got back? A. Yes, sir.

Q. And that you know to be so? A. Oh, yes; the account was closed up as soon as I turned."

That refreshes your recollection, doesn't it? A. Yes, sir, that refreshes my recollection; but I don't think that that is correct.

Q. What part of it is incorrect? A. I don't think that the account was balanced immediately; I think it took some time to get at the figures.

Q. Well, what has occurred since the examination which I read to you, which was taken the 26th of May to make you change? A. Nothing. 327

Q. When you were examined on the 26th of May the facts were more recent in your mind, were they not, than they are now? A. Why, certainly; several months more recent.

Q. And you were under examination on the two different days, were you not? A. Yes, sir.

Q. And you knew what you were going to be examined about, and you were requested to get the information for us? A. Yes.

Q. You were requested by us? A. Yes, sir.

Q. And after the examination was taken and re-

328 duced to typewriting you read it over and signed and swore to it before the Referee? A. Yes, sir.

Q. And among the questions and answers was the one I read to you that "the account was closed up as soon as I returned." When you got back to the bank did you find that any deposit had been made? You said that Mr. Sherwood told you that a deposit had been sent around? A. Mr. Sherwood told me that a deposit was on the way around.

Q. When you got back to the bank did you verify that? A. I don't remember whether I verified—I don't remember when the deposit came around; I
329 didn't receive it myself.

By the Referee:

You spoke of a deposit of $54,048.18; was that the deposit? A. Yes, sir; Mr. Sherwood told me that the deposit was on the way around.

By Mr. Hays:

Q. When you got back did you find that that was so? A. I think so.

Q. Don't you know whether that came in while you were away or after you got back? A. I think that it came in while I was out.

330 Q. And that $54,048.18 was put to their credit subsequently to your going around to J. M. Fiske & Company? A. Subsequently to my leaving for J. M. Fiske & Company's office; it hadn't been received when I left the bank.

Cross-Examination by Mr. Larkin:

Q. You have been asked about some entries in your books with reference to the $400,000 loan, a debit and credit entry of $400,000 and a balance of $242,201.57. Aren't all those entries simply book-keeping entries for the convenience of bankers, the

effect of which is to show that of a $400,000 loan 331
there is $242,000 of it unpaid?

Objected to as incompetent and calling for the operation of the witness's mind, also calling for a conclusion.

Objection overruled.

Plaintiff excepts.

A. They are bookkeeping entries, the credit of $400,000 which was made in the morning at the request for a loan——

The question is read to the witness.

332

Mr. Hays: I object as before, and also that it is really putting the answer in the witness's mouth.

Objection overruled.

Exception.

A. Yes, sir.

Q. In your examination by Mr. Hays and in reading from some testimony of previous examinations, you spoke of an agreement, as I understand it; is this the agreement (producing paper to witness)? A. Yes, sir, that is the one.

The paper is offered in evidence. 333

It is marked Defendant's Exhibit A, 3 November, 1910, A. S.

[Printed herein at p. 452.]

Q. Have you from time to time since this agreement was made, in pursuance thereof, loaned J. M. Fiske & Company money?

Objected to as incompetent so far as the question says "in pursuance thereof."

Objection overruled.

Exception.

334 A. Yes, sir.

Q. It is a matter of fact that all the loans were made with reference to that particular agreement?

Objected to as incompetent and improper.

Objection overruled.

Exception.

A. Yes.

Q. Will you look at the daily balances; you have the books showing daily balances, and will you tell us what the balance of J. M. Fiske & Company was at the close of business on January 7, 1910? A.
335 (Referring to book) $49,134.08.

Q. And what was the balance at the close of business on January 18, 1910? A. (Referring to book) $36,239.47.

Q. What was the bank balance at the close of business on November 19, 1909? A. (Referring to book) $45,024.71.

Q. What was the bank balance at the close of business on December 15, 1909? A. Referring to book) $42,102.80.

Q. You said in response to questions by plaintiff's counsel that you said to Mr. Sherwood that deposits had not come around; what did you mean
336 by that? A. I meant that the bank had not yet received a deposit from them.

Q. Why did you make the statement to him that deposits had not come around?

Objected to as incompetent.

Objection overruled.

Exception.

A. They had drawn a considerable amount against the credit which they had received in the morning, and had not yet made a deposit, notwithstanding it was some time since the withdrawals

had been made, which was the reason I asked him 337
why the deposit had not yet come around.

Mr. Hays: I move to strike out the statement of the witness "notwithstanding it was some time since the loan had been made," on the ground that he did not make any such statement to Mr. Sherwood, and as the operation of his mind.

Motion denied.

Exception.

Q. Why did you expect him to make a deposit before that time in the day?

Objected to as incompetent. 338

Objection sustained.

Defendant excepts.

Q. Did you have any idea that he would make a deposit by that time?

Objected to.

Objection sustained.

Exception.

Q. Is there any custom prevailing that you know of with respect to the time that deposits shall be made by persons obtaining these daily loans or 339
clearance loans?

Objected to as incompetent, improper, irrelevant and immaterial and the form of the question is objected to also.

Objection overruled.

Exception.

A. It is customary for the brokers to cover their credit loan as fast as their deposits are received by them.

340 Q. As fast as what are received by them? A. As fast as checks are received by them.

Q. What checks? A. Checks which they receive for the re-delivery of those stocks.

Q. Re-delivery of what stocks? A. Re-delivery of the stocks which they take up.

Q. Can you describe the operation of brokers obtaining these checks or these stocks that you mention?

Objected to because it has no relation apparently to this particular transaction; there are no facts now upon the record with relation
341 to the dealings with this bank and this firm of stock brokers.

The Referee: He may testify to any general custom that prevails between banks and brokers making these loans, if there is such custom.

Objected to as incompetent, irrelevant and immaterial.

Objection sustained.

Question withdrawn.

342 Q. Will you tell us the general custom prevailing in respect of the manner of a broker paying these daily loans obtained from a bank?

Objected to upon the same ground and as incompetent, irrelevant and immaterial.

The Referee: Tell what the general custom is; the only ground that would make this admissible is that there is some general custom prevailing in the Street. The witness may answer that.

Mr. Hays: I object further on the ground

that the custom is not competent as against the agreement here. 343

Objection overruled.

Exception.

The Referee: State the general custom, if you can.

A. The custom is that a broker will send in a request for a credit when he requires the same to clear his stocks, and the amount is credited to his account on the ledger; under the agreement which we have on file with all the brokers. The broker then uses that credit to accept the delivery of stocks and pays for them, or to pay off a loan with another institution, and it is customary for him to send a deposit of the checks which he receives to the bank, as fast as they are received. 344

By the Referee:

Q. Is there any custom prevailing in relation to these loans that is different from what is expressed in that agreement, that you identified a moment ago. A. Yes, sir; I should consider there was.

Q. Well, state that.

Objected to as incompetent, irrelevant and immaterial. 345

Objection overruled.

Exception.

A. The custom is for the brokers to make deposits at the bank as soon as their checks are received; that is, immediately, making the deposits without delay, or the securities to cover the amount of the advance made for the purpose of clearing their stocks.

Mr. Hays: I move to strike out the testimony of the witness on the ground that it is incompetent,

346 irrelevant and immaterial and upon the further ground that it appears that these loans were made under a written agreement, which is in evidence and which speaks for itself, and upon the further ground that there is no evidence here to show that these loans were made for any such purpose.

Motion denied.

Exception.

By Mr. Larkin:

Q. In the ordinary course of business when
347 would these deposits begin to come into the bank?

Objected to on the ground that in reference to this particular action the witness can state only, and the only competent evidence is to state, when they did make their deposits on other days; objected to as incompetent.

Objection overruled.

Exception.

A. The deposits are sometimes made fifteen or twenty minutes after the payments are made; sometimes deposits are received later.

348 Q. Is there any general custom prevailing betwen banks and brokers with reference to the act of the bank if the broker fails to make a deposit within a reasonable time after obtaining his daily loan?

Objected to as incompetent.

Objection sustained.

Defendant excepts.

Q. What is the custom, if any, between a bank and a broker if deposits are not made in the manner

you stated in describing the general custom—that is, promptly? 349

Objected to as incompetent, immaterial and irrelevant.

Objection sustained.

Exception.

Q. Is there any general custom as to the time when deposits should be made by brokers to their banks under these daily or clearance loans?

Objected to as incompetent.

Objection overruled.

Exception. 350

A. Yes.

Q. What is that general custom?

Same objection, ruling and exception.

A. The custom is if a deposit is not forthcoming immediately to call up the broker, or send around and ask why the deposit hasn't been received, and to hurry them up in making the deposit.

Mr. Hays: I move to strike out the answer.

Motion granted.

Exception. 351

Q. Assuming that the deposits which you speak of are not made in sufficient amount to pay off the advance of the daily loan, what is the custom of the Street, in the method of paying off the loan?

Objected to as incompetent; in the first place so far as the assumption goes it is certainly not competent; and secondly, objected to upon the ground that there is no proof here yet of any universal custom or of any custom under which

352 these parties contracted, and that the question is incompetent and irrelevant and immaterial.

Objection sustained.

Exception.

Q. Is there any general custom prevailing between banks and brokers with reference to the method of discharging these daily loans made by banks to brokers, in the event that the deposits made from checks received in the manner you have described are not sufficient to discharge the loans?

Same objection.

353 Objection overruled.

Exception.

A. Yes.

Q. Will you please state what the custom is. A. It is customary for the broker either to send his check to cancel the daily advance, or for us to charge it up without receiving a check from the broker.

Q. Charge what up? A. Charge it out of the account; charge the advance charged; debit the account.

Q. I say about paying the loan; my question was
354 with reference to the payment of the loan.

Objected to unless the question contains the entire question.

Mr. Larkin: Will the stenographer read the question substituting the word "pay" for the word "discharge."

The question is read to the witness, as follows:

"Q. Is there any custom prevailing between banks and brokers with reference to the method of paying these daily loans made

by banks to brokers, in the event that the de- 355
posits made from checks received in the manner you have described are not sufficient to repay the loan?"

A. If the checks and deposits are not sufficient the loan is cancelled; another loan is put through for the proper amount that is necessary.

Q. Does that pay the loan?

Objected to.

Objection sustained.

Exception.

356

Q. Is there any general custom prevailing between banks and brokers with reference to the manner of paying or securing these daily loans, when the amounts of the deposits are not sufficient to pay the loans?

Objected to as incompetent, irrelevant and immaterial.

Objection overrued.

Exception.

A. If the deposits are not sufficient to pay the loans a loan for a different amount can be substi- 357
tuted for the original amount.

Q. I ask you if there is any general custom, and if so what the general custom is; not what they can do?

Same objection, ruling and exception.

A. The general custom is that if the checks or deposits are not received in sufficient amounts to cancel the advance which has been made, a loan for a sufficient amount would be entered, and the loan cancelled.

Q. When you say "A loan for a sufficient amount

358 would be entered" would that be a loan without collateral?

Objected to.

Objection sustained.

Exception.

Q. Describe the loan that would be entered on the books and the nature of that transaction?

Objected to as a supposititious question; the witness has a right to prove a general custom under your Honor's ruling.

359 Objection overruled.

Exception.

A. No.

By the Referee:

Q. You gave J. M. Fiske & Company credit on your books of $400,000 at their request on that morning? A. Yes.

Q. You credited that to their account? A. Yes, I credited that to their account.

Q. And they could draw their checks against it? A. Yes.

360 Q. At the time you made that credit you had no collateral security for that loan? A. There were no securities handed in at the time the loan was made.

Q. Then you had none? A. No.

Q. During the day you expected them to make deposits to their account? A. We expected them to make deposits, or furnish us with security.

Q. And at the close of the day suppose their deposits or the security was $250,000, leaving a balance to their credit of $150,000 that you had given them in the morning. You would have no security

at the close of the day after that $150,000? A. We should be short the security. 361

Q. Is there any general custom among banks as to what the broker does under that situation?

Same objection, ruling and exception.

A. The broker would——

Q. Is there any general custom prevailing between the banks and the brokers in reference to that? If there is, you must know it? A. Yes.

Q. Well, what is it? A. The custom would be for the broker to hand us additional collateral or checks for a sufficient amount to make his account balance.

Q. Suppose he don't do that; is there any custom that governs the bank under those circumstances? A. In case the broker fails entirely to make good? 362

Q. Yes. A. Well, it doesn't occur very often, you know.

Mr. Hays: I should like to move to strike out the testimony that your Honor has elicited, upon the ground that the witness's answer shows that there is no custom in relation to this matter.

Motion denied.

Plaintiffs except.

The examination of this witness is suspended. 363

MARCUS SCHNITZER, being duly sworn as a witness for the plaintiffs, testifies:

By Mr. Wolf:

Q. On the 19th of January, 1910, were you indebted to J. M. Fiske & Company in a sum in excess of $14,000? A. I can't say exactly whether it was $19,000 or $1,900; I know that I bought stock there and I know that I owed them money.

364 Q. You have been sued for that debt, haven't you? A. Yes.

Q. Served with a summons and complaint? A. Yes.

Q. Have you put in any answer? A. I did not.

Q. Are you in default in putting in an answer? A. Well, I was promised that the bill would be pigeonholed by the Receiver; and therefore I did not put in an answer, because I am not able to pay $1,900 today, and I tried to avoid notoriety.

Q. On the 19th of January, 1910, were you able, financially, to pay any portion of the claim of J. M. Fiske & Company? A. No; I had lost every
365 dollar I had; no, I am not able to pay; I just said that to you. The Receiver promised me he would pigeonhole the claim.

Q. Did you on the 19th of January, 1910, have any property or assets with which to pay a claim of J. M. Fiske & Company against you? A. No, excepting my income that I have as a practising attorney; I am a practising attorney, and I have a certain income, but all that I get I need for my daily expenses, for my disbursements.

CROSS-EXAMINED BY COUNSEL FOR DEFENDANT:

366 By Mr. Larkin:

Q. How late did you deal with J. M. Fiske & Company? A. How long ago I commenced to deal with them?

Q. How late did you deal with them? A. I think it is about—I can't exactly state when I ceased to deal; I know when I commenced—pardon me; I think I told you, I recollect, on the day when the panic was I ceased to deal with them, the 15th of October, 1907.

Q. What stock did you buy and sell with them? A. On what date? I had different stocks.

Q. Any day you pick out. A. Well, I bought 367
stock which they did not buy for me, and I sold stock which they didn't sell; so I cannot tell you; so I cannot give you the answer.

Q. What days did you do that; did they ever actually buy anything for you? A. Well, I should say yes; oh, yes.

Q. What did they ever buy for you? A. Well, I desire to correct my statement, because I don't want to put it in such a way as you would construe it that I don't think they are honest people; I think they are honest people; but in the days of the panic when I gave an order to buy they didn't buy, and 368
when I gave an order to sell they didn't sell; so that is what I mean; when I saw that they didn't buy the stock which I bought, I mean in the excitement they failed to buy the stock for me.

Q. What stock did you have bought by them on the 19th of January? A. Unless I consult my statement I couldn't tell you.

Q. Have you got your statement with you? A. I didn't know that you would ask me this question.

Q. (Repeated.) Have you got your statement with you? A. No, no.

Q. Did they have any stock for you? A. Yes; I had Union Pacific and Smelters and Copper. 369

Q. How much did you have of each? A. I have to consult my ledger about that.

Q. Did you know what your debit balance was? A. No.

Q. You don't know? A. No; I always had a credit balance.

Q. Did you know what your credit balance was at that time? A. I am practising attorney, and I am not well versed in finances; that is the reason I lost my money.

370 Q. Who is it said he would pigeonhole this?

Objected to.

Objection sustained.

Question withdrawn.

The Witness: I would like to correct my statement. It seems to me that the attorneys misconstrue; I admit that I owed money to the firm, and I asked the Receiver as a matter of friendship; I told him that I had no money to pay any amount, and he told me that if I made such an affidavit that
371 I owed money to the Receiver that he would not commence an action against me.

Q. Is your financial condition any worse today than it was a month before the panic? A. It can't be worse.

Q. Well, I ask you whether it is? A. Well, it can't be.

Q. Were you unable to pay on the 1st day of January any debts that you owed, this year? A. I was unable to pay.

Q. Who, in the firm, received your orders and executed them? What member of the firm?

372 Objected to as immaterial.

Objection sustained.

Exception.

Q. Who introduced you to that firm?

Objected to.

Objection sustained.

Exception.

Q. Have you any judgments against you? A. I think so.

Q. Don't you know? A. Yes.

Q. How lately have they been entered against you? A. Well, I don't know whether that $14,000 judgment was entered against me; that is the reason I said "I think so." 373

Q. You think there is a judgment entered against you by the Trustees of this estate? A. They promised me that they will do it unless I make an arrangement——

Q. Is that the only judgment you know of? A. I have other judgments.

Q. What are they?

Objected to as immaterial.

Objection sustained. 374

Exception.

The last exhibit in this hearing is Plaintiffs' Exhibit No. 6.

Adjourned till tomorrow, 4 November, 1910, at 10.30 A. M.

NEW YORK, 4 November, 1910.

Met pursuant to adjournment. 375

Present—The Referee;

Mr. HAYS and Mr. WOLF, for the plaintiffs;
Mr. LARKIN, Mr. GARRETSON and Mr. FREEDMAN, for the defendant.

Mr. Larkin: We are asked to agree that figures appearing upon certain sheets here produced (Plaintiff's Exhibit 4 for Identification) correctly represent the transactions on the floor of the Stock Exchange on the 19th of January, 1910. I don't

376 want to be captious about the proof, but I want to agree as to what the facts are. I do not think it is material what the reported transactions were of any of the securities on that day. My difficulty in agreeing to these sheets is this: that these sheets do not represent, as I am informed, the consecutive transactions on the floor of the Exchange. I refer to these large printed sheets. They represent transactions that have been at some time executed, and the transactions are selected and placed under the heading of each particular class of stock or bond or security, as the case may be. There are times indi-
377 cated there; but those times do not correctly denote the moment of the execution of the order.

The Referee: It is not necessary for you to explain to me why you do not accept them. It is sufficient that you state that you do not accept them.

Mr. Larkin: Very well; but I am perfectly willing to agree about it.

IRVING L. ERNST, being duly sworn and examined as a witness for the plaintiffs, testifies:

By Mr. Hays:

378 Q. You are an attorney at law? A. Yes.

Q. Where is your office? A. At 170 Broadway, New York City.

Q. You were Receiver in the matter of the bankruptcy of J. M. Fiske & Company? A. Yes.

Q. You were subsequently elected Trustee? A. One of the three trustees.

Q. When were you appointed Receiver? A. On the 19th day of January, 1910.

Q. In the bankruptcy proceeding? A. In the bankruptcy proceeding against J. M. Fiske & Company.

Q. After you had qualified what did you do? A. 379
I took possession of the assets and effects of the firm of J. M. Fiske & Company and of the individual partners.

Q. Did you go down to the office of J. M. Fiske & Company on the 19th of January? A. Yes, at 42 Broadway.

Q. And took possession of the books, all of them?

A. Took possession of all the books and of all the tangible assets.

Q. Including the books of account? A. Including the books of account.

Q. Whom did you employ, if anybody, to go over 380
the books of account and check them? A. The Standard Audit Company.

Q. Will you state what assets you received as Receiver of the firm of J. M. Fiske & Company? A. I sold all of the tangible property, as Receiver, except the securities; I sold the office furniture and fixtures——

Q. You received the office furniture and fixtures? A. Yes, and a collection of outstanding accounts, dividends, and accounts due from brokers; in all $60,997.87.

Mr. Larkin: I move to strike out the answer as 381
irresponsive to any question that has been asked.

Motion granted.

By Mr. Larkin:

Q. Did you get $60,000 in cash? A. I realized from the sale of——

By the Referee:

Q. What did you receive? A. I received office furniture and accounts on the books and fixtures and stocks and securities of various kinds.

382 By Mr. Hays:

Q. State what stocks you received; is it a long list? A. Yes, it includes pages a, b, c and d down to the lead pencil line on d in my report. It does not include anything that is written in lead pencil on line d.

Q. Pages a, b, c and d, which you have marked, contain a list of the stocks and securities that you received on the 19th of January after you became receiver? A. As Receiver.

The sheets above referred to are handed to Counsel for the Defendant for inspection.

383 They are marked as a whole Plaintiff's Exhibit 7 of 4 November, 1910, A. S.

[Printed herein at p. 382.]

Q. Are the securities mentioned on pages a, b, c and d of the paper marked Plaintiffs' Exhibit 7 a list of all the securities you received? A. As Receiver, yes.

Q. What else did you receive as Receiver besides the securities which you have mentioned? A. The outstanding accounts, a list of which appears on pages e, f and g of my account.

384 The pages above referred to are marked as one exhibit, Plaintiffs' Exhibit 8, 4 November, 1910, A. S., and are attached hereto.

[Printed herein at p. 387.]

Q. And besides the customers' accounts what else did you receive? A. I received in the individual estate of Mr. Fiske an automobile; in the individual estate of Mr. Sherwood an automobile; which I have sold; I received a balance from the Produce Exchange Bank of $1,915.77; that was to the credit of the firm; I received from the bank account of C. W. Washburn, one of the partners, $41.20, and from the bank account of A. C. Sherwood $362.41; from the bank account of Mr. Fiske

individually, $92.03. I received various dividends 385
from stocks and various balances due from brokers.

Q. First we will take the dividends from stocks. What is the total of them? They are not classified; they are all included in the item of my report called "Receipts," consisting of three and a half pages.

Q. Will you mark those pages? A. Yes.

The witness marks the pages 8, 9, 10 and 11, and they are marked as one exhibit, Plaintiffs' Exhibit 9, 4 November, 1910, A. S.

[Printed herein at p. 390.]

A. (continued) All my cash receipts of every 386
nature and description are included in these pages.

Q. In addition to the amounts of the bank balance which you have testified to which you received, and the securities which are shown upon Plaintiffs' Exhibit 7, and the amounts which are shown upon Plaintiffs' Exhibit 8, what else did you receive as Receiver? A. I received various dividends from the stocks as Receiver, and balances due from brokers.

Q. Are the balances due from brokers exclusive of the accounts which have been mentioned here? A. Yes. This list of accounts receivable, which has been marked Plaintiffs' Exhibit 8, is the receivables 387
that were left after I collected accounts and the collections are included in pages 8-11.

Q. And in addition to the assets you have mentioned you say you received some office furniture and fixtures? A. Yes.

Q. All these receipts were by you, as Receiver? A. Yes.

Q. What did you do with the office furniture and fixtures? A. Sold them at public auction.

388 Q. And what did they realize?

Objected to as immaterial, what they realized after the date of the filing of the petition.

Objection overruled.

Defendant excepts.

A. $769.87.

Q. Did you sell those as Receiver? A. Yes, at public auction.

Q. Subsequently, did you make efforts to collect the accounts of the customers that were due to the firm of J. M. Fiske & Company? A. From the very
389 day I was made Receiver I made efforts.

Q. What efforts did you make? A. I wrote a number of letters; when the debtors didn't respond to my letters, I caused one of my clerks to visit them, and then if they didn't pay, I had my attorneys, Messrs. Hays, Hershfield & Wolf, examine them before Commissioner Alexander to ascertain the reason why they didn't pay.

Q. Can you now state what amount you collected from those debtors? A. (Referring to Plaintiff's Exhibit 8) The A. P. Morison account, which is entered here at $111,108.29 was compromised at a meeting of the creditors called under the Bank-
390 ruptcy Act at the sum of $10,000 paid in instalments; and I have thus far received $1,000 on that account; and I have received $600.23 from Henry M. Wise, which is the full amount. That is all I have received from these accounts.

Q. The securities which you have testified to that you received, and which are shown on Plaintiff's Exhibit 7, what did you do with those, as Receiver? A. They are now being advertised for sale.

Q. They were delivered over by you as Receiver to the Trustees? A. To the Trustees.

Q. All of them? A. Yes.

Q. None of them were sold by you as Receiver? 391
A. No.

Q. Have any of them been sold yet by the Trustees? A. Not as yet.

Q. You say you are now advertising them for sale? A. Yes.

Q. In what way? Public auction? A. They are being sold at the regular weekly auction sale of Adrian Muller & Son at the Real Estate Exchange, and it has been done on notice to all creditors, sent through the mail and by advertisement in the *New York Times*.

Q. When is that sale? A. I believe it is next 392
Wednesday, the day after Election.

Q. None of these stocks are quoted stocks, are they? A. Yes, a great many of them are.

Q. On pages 8, 9, 10 and 11 in the receipts shown there, do those receipts represent the sale of any securities you received as Receiver? A. I didn't sell any, but those three and a half pages represent every receipt of every kind, nature and description received by me as Receiver.

Q. You say you have received in cash $60,997.87? A. Yes.

Q. In addition to those receipts of cash, have you any other property—have the Trustees any other 393
property in their account of the estate of J. M. Fiske & Company in November, except the securities which are shown on this Plaintiff's Exhibit 7 which are now being advertised for sale; and the accounts? A. Yes.

Q. What else have you? A. The Trustees have collected by way of dividends and outstanding accounts $2,250.20, and we have received additional stock from the Plaza Bank on the liquidation of their loan; but these stocks are subject to a reclamation proceeding, being claimed by a man by the

394 name of Marcus Hottenstein; these stocks are as follows: 5 shares of Corn Exchange Bank, 5 shares of Chase National Bank, 2 Chemical National Bank shares, 3 Hanover National Bank shares, 13 Union Exchange Bank and 2 First National Bank.

Q. Have you stated all the assets which the Trustees have? A. Yes.

Q. Now this $2,400 that you said you had received since: where is that? A. That is a copy of my Receiver's account; that $2,250 is received by the Trustees.

Q. Can you state what that was received from,
395 so that it can be eliminated from the Receiver's account? A. Yes.

Q. Have you a list of it there? A. Yes.

Q. Will you give it to the stenographer? A. Yes. It is as follows:

Kerr Lake Div.	$25.00
Norfolk & Western R. R. Div.	6.25
Received from Plaza Bank.	140.32
This item is subject to reclamation by Hottenstein.	
First National Bank Stock Div.	16.00
Also subject to reclamation.	
396 Cedar Lake Park Div.	15.00
Nevada Consolidated Div.	11.25
Yukon Gold Div.	5.00
First National Bank Div.	16.00
This is subject to reclamation.	
A. P. Morrison.	1,000.00
Nipissing Div.	4.88
Vulcan Detinning Div.	12.50
Check of A. P. Morrison, which I have entered as cash.	1,000.00
Not yet collected.	
	$2,252.20

CROSS-EXAMINED BY COUNSEL FOR DEFENDANT: 397

By Mr. Larkin:

Q. Have you enumerated all the property that you have received, either as Receiver or as one of the Trustees? A. I believe I have (refers to list).

Q. I won't trouble you to look further about that. Did you find any pooling agreements in the office? A. Yes.

Q. Have you those here? A. No, I gave them to my counsel.

Counsel for defendant calls for the pooling agreements. 398

Q. Did you examine these pooling agreements? A. Yes.

Q. Did you find that the firm of J. M. Fiske & Company had any choses in action against any person under those pooling agreements? A. I believe so.

Q. Against whom? A. Among other people, against James R. Keene.

Q. Did you regard that chose in action as property that came in your possession? A. Yes.

Q. You haven't enumerated it on your account, or schedule? A. It is included in a different book; 399
not in a book, but in my report which is annexed to this account.

Q. What steps have you taken to enforce this chose in action? A. The Trustees have begun an action.

Q. How far has that action progressed? It is a suit in equity, is it? A. Yes.

Q. How far has that suit progressed? A. I can't tell you that; Mr. Wolf can state that; I am willing to accept his statement as my testimony.

400 Q. We will take his statement, but you verified the complaint? A. I verified the complaint.

Counsel for Defendant: I call for copy of the complaint.

Q. You examined the complaint before verification? A. Yes. There are two suits.

Q. Have you brought any other suits against any other persons that are not mentioned in your list? A. They are mentioned in my report, but not in my list.

Q. Will you please mention those? A. Yes; I commenced a suit for a substantial amount against
401 Berthold Levy. I think the amount involved in that suit is around $40,000. In addition to that, I have commenced suits against various of these debtors who have refused to pay, but not any individual amount is very large or substantial.

Q. Is that the same Mr. Levy that you have mentioned as Berth Levy? A. Yes, he is known as Berth Levy.

Q. To come back to the suit against James R. Keene, do you recall the amount of damages that you asked or do you recall the extent of the relief that you asked for? A. I would rather refer to my
402 counsel if you want that definitely and exactly; I have looked over the complaint and verified that, but I don't really remember the prayer for relief.

Q. Well, you as Receiver found that you had a chose in action, and you advised with your counsel, and they brought suit? A. Yes, but not as Receiver; as Trustee.

Q. Well, now, what was that chose in action that you found?

The Referee: Why do you not let Mr. Wolf state?

Mr. Wolf: It is an action for an accounting; there 403
isn't any specific amount named.

Q. What were the facts? A. Mr. Wolf made the examination himself; he personally conducted the examination of Keene, and he received the minutes of the testimony and I believe he went over it very carefully before he brought the action, and I guess he can state with a great deal more accurateness and definiteness than I can.

Q. I should like to have you state the chose in action that you found and a statement of what you considered your rights under that chose in action at the time you became Receiver, or when- 404
ever you found that there was this chose in action. A. I can state in a general way. If you want it from me I am willing to state it. I felt that Mr. Keene violated his duty as syndicate manager for the Hocking Pool. I felt that he traded in stocks of the Hocking Company as an individual to his own profit, in violation of his rights and duties as manager of the syndicate. I believe that he went short of the market when he knew, or had reasonable cause to believe, that there was going to be a drop in the market value of that stock. I believe he sold his own stocks to the syndicate, and sold short stock, and delivered some of his 405
own long stocks to the syndicate at high prices, and covered his transactions at bottom prices.

Q. And that conduct on his part resulted in a damage to the other members of the pool? A. That is the way I felt about it.

Q. To what amount? A. I think that is a matter of accounting.

Q. Did you form any estimate of the amount of damage? A. Well, in round figures I think so; but I don't want to state any amount that might

406 conflict with the suit that is now pending against Mr. Keene.

Q. What is your general impression about it?

Objected to.

The Referee: It is a mere matter of opinion.

Objection sustained.

Defendant excepts.

Q. You stated that he did some damage to these pool members; what was the damage that he did?

Objected to.

Q. What was the act that he did that resulted
407 in the damage?

The Referee: He has already stated that.

Objection sustained.

Defendant excepts.

Q. You found that he had sold his long stock, and gone short of stock and covered at the lowest price? A. My investigations led me to believe that that was the fact.

Q. And is it not the fact that the damage you claim is the difference in the price of the stock from what he sold it and what he covered?

Objected to.

408 The Referee: If they did claim it, the witness may answer.

A. I would rather refer to the complaint before I answer the question.

Q. That don't answer my question, unfortunately. You must have come to some conclusion before or after you conferred with Counsel as to what your claim was.

Objected to.

Objection sustained.

Defendant excepts.

Q. When were you appointed Receiver? A. January 19th, 1910. 409

Q. At what time in the day? A. I don't know what time I was appointed Receiver; I believe I was notified of the fact of my appointment between 3 and 4 o'clock in the afternoon.

Q. Was it nearer 3 than 4, can you recollect? A. I wouldn't like to state.

Q. Do you know what time of the day the petition in bankruptcy was filed? A. I had no knowledge that a petition was going to be filed; that first I knew was when I was notified of my appointment.

Q. (Repeated) Do you know what time of day the petition in bankruptcy was filed? A. No. 410

Q. When did you go to the office; what hour in the day or what time in the day? A. Immediately after I was notified, between 3 and 4.

Q. You got there between 3 and 4? A. Yes.

Q. And you took possession of everything on that day? A. Well, I took physical possession of everything in the office.

Q. I find from the petition in bankruptcy which has just been handed me by Mr. Wolf that it bears the stamp of the United States District Court January 19th, 1910, at 3.25 P. M. Does that refresh your recollection as to the time of the notification of your appointment, and the time when, in pursuance of that appointment, you went to the office of J. M. Fiske & Company? A. According to my recollection it was between 3 and 4, but this also serves to further refresh my recollection that it was nearer 4 than 3. 411

Q. Well, it wasn't between 3 and 3.25, was it? A. No, it couldn't be.

Mr. Hays: The petition in Bankruptcy in the matter of J. M. Fiske & Company as produced by the United States District Court shows the

412 file mark of 3.25 P. M., on January 19th, 1910. A copy of this petition can be put in evidence in place of the original.

It is marked Plaintiffs' Exhibit 10, 4 November, 1910, A. S.

[Printed herein at p. 394.]

MAX ISAACS resumes the stand.

By Mr. Hays:

Q. Do you see the books of J. M. Fiske & Company here? A. Well, from the appearance of
413 them they look like their books.

Q. Well, look at them. What book is that that you have in your hand? A. The stocks loaned and borrowed.

Q. Who kept that book? A. Mr Humphrey.

Q. In whose handwriting is it? A. Mr. Humphrey's.

Q. All of it? A. No, not all of it.

Q. Who else? A. That (indicating) looks like Maxie Lilienthal.

Q. On page 120 it looks like whose? A. Max Lilienthal's, part of it only, not all.

414 Q. Whose handwriting is on page 123? A. The same party, Max Lilienthal; here (indicating) is Mr. Sherwood's writing on page 125. There is some here on page 128 that looks like Lilienthal's.

The book is marked Plaintiffs' Exhibit 11 for Identification, 4 November, 1910, A. S.

[Not printed by consent. See pp. 2, 3 and 398.]

Q. What is the next book that you have? A. This is the private ledger.

Q. That you didn't keep? A. It wasn't kept by me.

Q. What is the next book that you have here? A. A ledger.

Q. Customers' ledger? A. Yes, from A to K. 415
Q. Who kept that? A. I did.

The book is marked Plaintiffs' Exhibit 12 for Identification, 4 November, 1910, A. S.

[Not printed by consent. See pp. 2, 3 and 399.]

Q. Here is the other customers' ledger, is it not? A. Yes, from K to Z. That was kept by me.

The book is marked Plaintiffs' Exhibit 13 for Identification, 4 November, 1910, A. S.

[Not printed by consent. See pp. 2, 3 and 399.]

416

Q. What is the next book that you have here? A. That is the purchase and sales book; that was not kept by me.

Q. Who was that kept by? A. Part of it was kept by Mr. B. F. Cogswell, and part was kept by Mr. Henry Kirschner.

The book is marked Plaintiffs' Exhibit 14 for Identification, 4 November, 1910, A. S.

[Not printed by consent. See pp. 2, 3 and 399.]

Q. What is the next book that you have here? A. That is a filing blotter. 417

Q. Who kept that? A. Well, I did all the filing of the blotter sheets, because they have to come to me to be posted in the ledgers and filed by me.

Q. Describe this book; what are these filing sheets? A. This is an odd lot blotter, an odd lot sheet.

Q. What does it show? A. All the transactions in odd lots.

Q. Whose writing are these sheets in (indicating)? A. In Endicott Fiske's.

Q. And these sheets were kept by you? A. No; there are various sheets there done by other people.

Q. In whose handwriting are these sheets (indi-

418 cating), if you know? You had better look through them and see. A. Well, some are done by Mr. Humphrey and myself; and Mr. B. F. Cogswell did very little of it.

Q. Have you given the names of all the persons who have done anything on these sheets? A. And Max Lilienthal did some of it.

Q. When you described this book of different sheets I don't think you described it fully. What kind of sheets are these; are they all one kind of sheets? Odd lots? A. Oh, no; odd lots, clearing house stock and ex-clearing house stock, which is
419 bonds and cash, etc. That ran all in one blotter.

Q. You have described this book and told us the handwriting in it? A. Yes.

The book is marked Plaintiffs' Exhibit 15 for Identification, 4 November, 1910, A. S.

[Not printed by consent. See pp. 2, 3 and 399.]

Q. I show you another book and ask you if that is one of the books of J. M. Fiske & Company? A. Yes.

Q. What was that book? A. That is a blotter.

Q. What kind of a blotter? A. I don't know.

420 Q. Whose handwriting is this in? A. Not any one in the office.

Q. Was it kept in the office? Have you ever seen the book in the office? A. I have seen the covers of the book, but not the writing in the book.

Q. You don't know anything about this book: is that it? A. No, I don't know anything about it.

Q. I show you another book and ask you if you know what book that is? A. A check book.

Q. Of J. M. Fiske & Company? A. Yes, the check book of the Mechanics National Bank.

Q. Who kept that? A. It was kept by three parties.

Q. Who were they? A. Max Lilienthal, Mr.

Humphrey, and Mr. Fiske did a little writing in it; 421
George Sadler, and that is about all.

The book is marked Plaintiffs' Exhibit 16 for Identification, 4 November, 1910, A. S.

[Not printed by consent. See pp. 2, 3 and 399.]

Q. Are there any other books that were kept by you for the firm of J. M. Fiske & Company, which are not here? A. No.

Q. Are there any other books that you know of that were kept by the firm of J. M. Fiske & Company by others which are not here? A. No.

Q. Were the books that were kept by you which 422
you have described, kept correctly?

Objected to.

Objection overruled.

Exception.

A. Why I take a trial balance off every Friday; and the last Friday the books were in good condition.

Mr. Larkin: I move to strike out the answer as not responsive.

Motion granted.

Q. (Repeated.) Were the books that were kept 423
by you which you have described, kept correctly? A. Yes.

Q. And you made entries in there in accordance with the facts?

Objected to as calling for a conclusion.

Objection overruled.

Exception.

A. Yes.

Cross-examined by Mr. Larkin:

Q. Did you make any entry in any book that wasn't copied from something else? A. Yes.

424 Q. What entry did you ever make in addition that wasn't copied from something else? A. Oh, no, I didn't——

Q. You made no original entry in books at all? A. No.

Q. So that in order to have you able to state that the books were kept correctly you would have to know that there was something else in which the copy was correct, wouldn't you? A. Yes.

Q. You have testified about the handwriting of certain of these books. Are you willing to swear that you have named all the persons that ever
425 wrote in the books? A. Well, I couldn't say all; I haven't gone through every sheet.

Q. Who kept the check book? A. Max Lilienthal did the most writing in it.

Q. Did you do any writing in it? A. No.

Q. Who else wrote in it? A. Mr. Humphrey's writing is there, and a party by the name of George Sadler.

Q. Who is he? A. He was one of the order clerks.

Q. Just look at the check book and begin at January 19th, 1910, and tell me whose handwriting appears in it. Begin here at the place where
426 the red ink entry is "1/18 10" written on the stub of the check, No. 59,521; and turn back through the month of January and see whose handwriting appears upon the stub on the opposite page on this check book? A. Well, that is Max Lilienthal's (pointing to red ink entry).

Q. Is that Max Lilienthal's? A. Yes.

Q. (Pointing to another entry.) Is that Lilienthal's? A. Yes.

Q. You are sure of that? A. Yes; the boy writes a good hand sometimes, and sometimes he writes a bad hand.

Q. Have you seen him write? A. Yes.

Q. And you will swear that that is his handwrit- 427
ing? A. Yes.

Q. Now, this page that I show you containing among other checks No. 59,516; whose handwriting is that? A. That is his also.

Q. Whose? A. The same party, Max Lilienthal.

Q. Is that Lilienthal's handwriting? A. Yes.

Q. And is this his handwriting (indicating)? A. Yes.

Q. That is written in backhand? A. Yes.

Q. And the rest is written on the other slant? A. Yes.

Q. And that is all his handwriting? A. That is all his handwriting. 428

Q. And the previous page is all his handwriting also? A. All his handwriting.

Q. And the previous page? A. Yes.

Q. And the previous page, beginning with stub No. 59,501; is that all his handwriting? A. No.

Q. Which is not his handwriting? A. Right here (pointing to stub No. 59,504).

Q. Whose handwriting is that? A. I can't think of his name; he is out in San Francisco now; oh, a party by the name of Childs.

Q. What were his duties? A. He was a sort of an order clerk, also. 429

Q. Did the order clerks run in and draw checks? A. They did jump in and help now and then.

Q. Do you know anything about this transaction that is represented by this check? A. From the face of it I see that it is $45,812.53 that has been paid for 400 Reading, and 100 Consolidated Gas; the price of the Reading was $31,405.23, and the price of the Gas is $14,407.30, making a total of $45,812.53.

Q. Will you show me some other place where any order clerk came in and wrote the stubs, within a reasonable time? A. Here is Mr. Fiske's hand-

430 writing (pointing to page containing the stub No. 59,466), and this also is Mr. Fiske's handwriting (pointing to stub No. 59,458).

Q. But I asked you to point out to me some place where some order clerk came in and wrote in the books. Whose is this handwriting (pointing to page containing stub of check No. 59,451)? A. Child's.

Q. Now, beginning at the stub No. 59,522 tell me whose handwriting appears from there on to the end of the check book? A. Maxie Lilienthal's.

Q. All of it? A. The red ink entries on the last
431 two pages are not his handwriting.

Q. Are you familiar with this check book? A. Yes.

Q. In what respect? A. Balancing it, or handwriting?

Q. Yes, balancing it. A. No, not balancing it; I never balanced it.

Q. Do you know whether in this check book at the end of each day appears approximately what their cash balance was in the bank? A. Yes.

Q. Look at the book and tell me what balance appears at the close of business on the 18th day of January, 1910, from this check book? A. There is
432 no 18th in it; 17th and 19th I see.

REDIRECT-EXAMINATION BY COUNSEL FOR PLAINTIFFS:

By Mr. Hays:

Q. I wish to ask you this: you say you made the entries in the ledger or something else; what did you make the entries from? A. From the blotter.

Q. Did you make them correctly from the blotter? A. Yes.

Q. Do you know whether the blotters were in balance? A. Well, Mr. Humphrey's blotter he bal-

anced himself; of course I never looked to see 433
whether they were balanced or not; my own clearing house blotter I balanced myself with the clearing house sheet every night and the odd lot blotter was balanced with C. M. Schott & Company. Then it comes to me and I do the posting.

Q. So whatever entries you made from the blotter were correctly made, and whatever entries you made in the blotter were correctly made? A. I believe they were correctly made; I balanced them every Friday.

RECROSS-EXAMINATION BY COUNSEL FOR DEFENDANT: 434

By Mr. Larkin:

Q. Where did you get the information from that you put in the blotter? You wrote entries in the blotter; where did you get the facts for those entries? A. From the purchase and sales book.

Q. Did you keep that book? A. No.

Q. Do you know anything about the correctness of the entries in that book? A. Well, I can't tell you about the clerk on those books.

The last exhibit in this hearing is Plaintiffs' Exhibit 16 for Identification. 435

Adjourned till Thursday, 10 November, 1910, at 10.30 A. M.

NEW YORK, 10 November, 1910.

By agreement between the attorneys, the reference is adjourned till Thursday, 16 November, 1910, at 10.30 A. M.

The hearing for 16 November is, by agreement between the attorneys, adjourned till Friday, 17 November, 1910, at 10.30 A. M.

436 NEW YORK, 17 November, 1910.

By agreement between the attorneys, the reference is adjourned till November 29, 1910, at 10.30 A. M.; and on November 29 by agreement between the parties the hearing is adjourned till December 13, 1910, at 10.30 A. M.

On December 13, 1910, the Referee adjourns the hearing, at request of counsel, to a date in January to be fixed.

NEW YORK, 4 January, 1911.

437 Met pursuant to adjournment.

Present:

THE REFEREE;

MR. HAYS and MR. WOLF for the plaintiff;

MR. LARKIN and MR. GARRETSON for the defendant.

ANDREW P. MORISON, being duly sworn and examined as a witness for the plaintiff, testifies:

438 By Mr. Hays:

Q. What is your business? A. Broker.

Q. What was your business on January 19th, 1910? A. The same.

Q. You were a debtor of the firm of J. M. Fiske & Company on January 19th, 1910? A. Yes.

Q. Do you remember whether you were such debtor to an amount in excess of $100,000? A. Yes.

Q. About $134,000, was it? A. Yes.

Q. What was your financial condition on the 19th of January, 1910?

The Referee: Could you pay the debt? 439

A. No, I could not pay, or it wouldn't have been standing there.

Q. Do you remember the amount was $141,108.29? A. Yes.

Q. You were not able to pay the debt on January 19th, 1910? A. No.

Q. Did you have any assets? A. Yes.

Q. What assets? A. Well, an interest in mines and in some industrials, and in real estate; but everything was hypothecated; I had nothing available.

No cross-examination. 440

OSCAR BAMBERGER, being duly sworn and examined as a witness for the plaintiff, testifies:

By Mr. Hays:

Q. What is your business? A. Dealer in outside stocks; a curb broker.

Q. How long have you been in that business? A. 10 years.

Q. In the City of New York? A. Yes.

Q. Where is your office? A. 25 Broad Street. 441

Q. What is your firm? A. Bamberger, Loeb & Company.

Q. Does your firm and do you personally make a specialty of stocks that are not sold on the New York Stock Exchange? A. Yes.

Q. Stocks that are sold on the curb? A. Yes.

Q. And stocks that are not sold on the curb; sold elsewhere? A. Sold over the counter, yes.

Q. As I understand it you make a specialty of informing yourselves as to the value of outside stocks? A. Yes.

442 Mr. Larkin: I recognize the witness's qualifications; let him make a suggestion and I will probably agree to allow it.

Q. You knew the value of the following stocks on the 19th of January, 1910, at 12 o'clock; Atlas Mining, Boston Copper, Bovard Copper, Butte Coalition, Coniagas Mines, Cobalt Central, Comstock Tunnel, Cripple Creek Pfd., Consolidated Steamship Co., Greenwater Copper, Giroux Copper, Greene Cananea, Indian Valley, Kerr Lake, Manhattan Transit, Nipissing Mining Co., Phoenix Insurance Co., Pan Silver Mining Company, So.
443 Utah M. & S., Standard Rope & Twine, Title Guarantee & Trust Company, Vigoro Leather Pfd., Yukon Gold? A. Yes.

Q. Can you tell us what the market value of those stocks was on the 19th of January, 1910, at 12 o'clock? A. Yes.

Q. Well, take the Atlas Mining? A. The Atlas Mining has had no value at all for many years.

Q. Boston Copper? A. Boston Copper sold at 12 o'clock, if you will permit me to look at my sheet—

Q. Yes. A. —at 12 o'clock about 18½.

Q. Bovard Copper. A. At about 4 cents.

444 Q. Butte Coalition. A. At about 25½.

Q. And Coniagas Mines? A. Coniagas Mines was inactive on that day, but it could readily have been sold at $6 a share.

Mr. Larkin: I object and move to strike out the answer.

The Referee: He can say the last sale.

The Witness: $5.85.

Q. How long have you known that stock? A. About a year and a half or two years.

Q. And you have kept familiar with the sales of it? A. Yes.

Q. Cobalt Central. A. At about 20½ cents; it 445
sold at 20½ cents at 12 o'clock sharp, January 19th, 1910.

Q. Comstock Tunnel. A. Comstock Tunnel sold at about 10 or 15 cents a share.

Q. Cripple Creek Pfd. A. About $43 a share.

Q. Consolidated Steamship Company. A. No market and no value at that time.

Q. Was that one of Morse's stocks? A. That was one of Morse's original promotions.

Q. Grenwater Copper Company stock? A. Grenwater Copper Company stock sold out at that time at 11 cents a share.

446

By Mr. Wolf:

Q. Did you give the value for the Consolidated Steamship Company? A. No value at all.

Q. Giroux Copper. A. $11 a share.

Q. Greene Cananea Copper. A. Greene Cananea at about $10.

Q. Indian Valley. A. No market.

By Mr. Hays:

Q. Do you know anything about Indian Valley stock? A. Well, I have never traded in it, and I don't know anybody else that has; I think it was 447
a stock that was washed from time to time and hadn't any real value, or any real market.

Q. Kerr Lake? A. Kerr Lake has been an inactive stock that was selling at about $9 at that time.

Q. Manhattan Transit? A. At about $1⅞ a share.

Q. New York, Lake Erie & Western? A. That was on the Stock Exchange.

Q. Nipissing Mining Company. A. At about $10 a share.

448 Q. Ontario Silver? A. That is on the Stock Exchange, but it is sometimes traded in on the curb, in spite of the fact that it is listed on the board.

Q. Phoenix Insurance Company? A. I am a specialist, a particular specialist in that; about $225 to $250.

By Mr. Garretson:

Q. Bid or asked? A. About that time I paid $250 a share for it.

By Mr. Hays:

449 Q. Pan Silver Mining Company? A. No market.

Q. There was no market for that at all? A. No.

Q. Did it have any value on that day? A. No.

Q. So. Utah M. & S. A. 100 shares of that sold at 12 o'clock noon on January 19th, 1910, at $33⅜.

Q. Standard Rope & Twine. A. That is a very inactive stock, and selling at about 15 cents a share.

Q. Title Guarantee & Trust Company? A. $565 bid on January 19th; offered at $575; the last sale was $567.66.

450 Q. That was for six shares then? A. Yes.

Q. Vigoro Leather Pfd.? A. Well, I haven't been able to find it and never heard of it.

Q. In all your dealing on the curb in these securities, and over the counter, have you ever heard of its being in the market? A. I have never heard it mentioned.

Q. Yukon Gold? A. Yukon Gold $4¾.

CROSS-EXAMINED BY COUNSEL FOR THE DEFENDANT. 451

By Mr. Larkin:

Q. You are testifying from a memorandum that you hold in your hand. Will you tell me what that is? A. That is the report of sales of curb stocks on January 19th, 1910.

Q. Issued by whom? A. Issued by the Bennett Press.

Q. Do you know where they get the information from for that? A. This information is compiled on the curb from reporters on the Bennett Press who get it from the curb brokers. 452

Q. In your testimony this morning you are not trusting to your recollection; you are referring entirely to this memorandum, are you not? A. I trust to recollection by refreshing my recollection from this sheet.

Q. Your recollection would not enable you to tell to a fraction of a point either of these securities sold at 12 o'clock, January 19, 1910? A. Not the definite fraction of a point, but within a fraction of a point.

Q. But without this paper you couldn't give accurate information? A. Oh, I could come very close to it. 453

It is stipulated and agreed by and between the parties hereto that the values of the following stocks and securities as of January 19, 1910, at 12 o'clock noon on said day, were the sums set opposite the names of the following securities:

American Smelting & Refining Co..... 94
American Smelting & Refining Co. Pfd.. 110
Amalgamated Copper 82¾
American Ice 23⅞

454	American Express	280
	Anaconda	49⅞
	American Sugar	122⅛
	American Car & Foundry	66
	Allis-Chalmers Co. Pfd.	49⅞
	American Agricultural Chemical	45
	American Beet Sugar	43½
	American Hide & Leather Pfd.	43
	American Hide & Leather	7¼
	Atchison, Topeka & S. F. Com.	118⅜
	A. T. & S. F. Convertible 5's	118½
	American Tobacco	415
455	American Can Com.	12¼
	American Tel. & Tel.	136⅞
	American Can Pfd.	78⅞
	American Malt Pfd.	36
	Allis-Chalmers Com	13½
	American Linseed Pfd.	43¼
	American Linseed Com.	15¾
	American Woolen	33
	B. & O. Com.	115¾
	Braden Copper	4⅝
	B. R. T.	74¾
	Bethlehem Steel	30¼
	Batopilas	3
456	British Col. Copper	7
	Brooklyn Union Gas	158¼
	Bond & Mortgage Guarantee Co.	265
	Chase National Bank	430
	Chemical National Bank	445
	Corn Exchange Bank	320
	Carnegie Trust Co.	155
	Calumet & Hecla	660
	Chicago & Alton	63¼
	Colorado-Midland First 4's	80¼
	Cobalt Silver Queen	20 cts
	Colorado Fuel & Iron	44⅛

C., C., C. & St. L.	79	457
Chicago Great Western	32⅜	
Chicago Great Western "A"	32⅜	
Chicago Great Western Pfd.	60¾	
Corn Products	20½	
Colonial Silver	37½ cts	
Chicago, Milwaukee & St. Paul	147⅛	
Con. Arizona 5% Scrip	55 cts	
Consolidated Gas	151¼	
Chicago Subway	4¼	
Chicago, R. I. & Pac.	42½	
Columbus & Hocking 6's	100	
Chicago, R. I. & Pac. Pfd.	84¼	458
Canada So. 1st Mtge. 6's	105	
Colorado Southern	57	
Col. Fuel & Iron Pfd.	112¾	
Central Leather	43¼	
Chesapeake & Ohio	85¼	
Chicago Union Traction	4½	
Chicago Union Traction Pfd.	10	
Delaware & Hudson	178	
Duluth, So. Shore & Atlantic	14½	
Denver & Rio Grande	44¾	
Denver & Rio Grande Pfd.	80½	
Ely Central	1¾	
Erie Com	31	459
Eastman Kodak	391	
Erie 1st Pfd.	48½	
Ely Consolidated	¾	
Furnace Creek	6 cts	
First National Bank of N. Y.	900	
Florence Goldfield	2⅜	
First National Copper	6⅜	
Great Northern Pfd.	132	
Great Northern Ore Certificates	72¾	
Goldfield Consolidated	7½	
Goldfield Daisy	8 cts	

460	Golden Anchor	5 cts
	Hanover National Bank	650
	Home Ins. Co.	610
	Hanover Fire Ins. Co.	175
	International Mercantile Marine	6½
	International Mercantile Marine Pfd.	20¾
	International Paper	14⅛
	International Mercantile Marine 4½'s	69
	Interboro-Met.	20¾
	Interboro-Met. Pfd.	56¾
	Interboro-Met. 4½'s	81⅜
	Illinois Central	142⅛
461	Iowa Central Pfd.	48
	Iowa Central 4's	75
	June Oil	20 cts
	Jersey City 7's, 1913	110
	Jersey City Water 7's 1913	110
	Kansas City Southern Preferred	68⅜
	Long Island R. R. Co.	65½
	Louisville & Nashville	150⅞
	Lawyers' Mtg. & Guarantee Co.	238
	Louisville & Nashville First 5's	110
	Lacelde Gas	107½
	Missouri Pacific Rights	7/32
	M. K. & T. Com.	44¾
462	Missouri Pacific	69⅜
	Market & Fulton Bank	260
	Mackay Co. Pfd.	77
	Mergenthaler Linotype	214
	Manhattan Elevated	136½
	Mines Company of America	48 cts
	Norfolk & Western	97
	National Biscuit Com.	112
	N. Y. Central	117½
	Northern Pacific	132⅞
	N. Y., Ontario & Western	45¾
	N. Y. Air Brake Convertible 6's	113

Nevada Consolidated	24½	463
National Enameling & S. Co.	24	
Nat'l R. R. of Mexico 1st 4% Scrip.	62¼	
Nat'l R. R. of Mexico 2nd 4% Scrip.	26⅝	
Northern Securities Stubs	106	
N. Y., New Haven & Hartford	154½	
National City Bank	420	
National Lead	85	
North American	79⅛	
N. Y. Air Brake	87½	
Niagara Power 6's	100	
Nevada-Utah	1½	
Nevada Smelting	1	
N. Y., Chicago & St. Louis	59	464
Pittsburg Coal	22	
People's Gas	113	
Pacific Coast	112½	
Pennsylvania Railroad	133⅜	
Phila. & Reading	161	
Pennsylvania Warrants	130⅜	
Pressed Steel Car Pfd.	103	
Pressed Steel Car Com.	46½	
Pacific Mail	34	
Quicksilver	3¼	
Quicksilver Pfd.	4	
Republic Steel	38½	465
Republic Steel Pfd.	100½	
Southern Railway	30½	
St. Louis & San Fran. 5's	88⅝	
Southern Pacific	130⅞	
St. Louis & Southwestern	31	
St. Louis & Southwestern 1st Mtge. 4's.	93	
Southern Railway Pfd.	68	
Sloss-Sheffield Com.	81	
Singer Mfg. Co.	495	
Standard Oil	641	
St. Louis & San Fran. 2nd Pfd.	55	

466	Tonopah Extension	¾
	Tennessee Copper	37
	Third Avenue	15
	Texas & Pacific	32½
	Toledo, St. Louis & Western	49¼
	U. S. Steel Pfd	122¾
	U. S. Rubber 1st Pfd	112⅛
	Utah Copper	53
	Union Ex. Bank	190
	U. S. Cast Iron Pipe Pfd	80½
	U. S. Steel Com	83¾
	U. S. Realty	80
467	Union Pacific Convertible 4's	111½
	U. S. Rubber	45¼
	Union Pacific	191⅞
	Virginia-Carolina Chemical	53¾
	Vulcan Detinning Pfd	76
	Wabash Com.	22½
	Wheeling & Lake Erie	5½
	Wheeling & Lake Erie 1st. Pfd.	12⅛
	Western Maryland	50¾
	Wabash Refunding 4's	74
	Wabash Pfd.	50¼
	Wabash Pittsburg Terminal 4's	48½
	Westinghouse	71¾
468	Western Union	73¼
	Wabash Pittsburg Terminal 2nd. 4's	7
	Wisconsin Central 1st Pfd. 4's	94½

Adjourned till Tuesday, January 10, 1911, at 3 P. M.

Adjourned to Wednesday, January 11, 1911.

NEW YORK, January 11, 1911. 469

Met pursuant to adjournment.

Present as before.

It is stipulated and agreed by and between the parties hereto that the values of the following stocks and securities on January 19th at 12 o'clock, noon, on said day were the sums set opposite the names of the said securities:

Boorum & Pease Prefd.....	120
Distillers	33½
Erie 2nd Prefd.	38⅜ 470
New York, Lake Erie & Western	31
Ontario Silver	2¾
Pennsylvania Warrants	30 per share
Railway Steel Springs Prefd..	105
St. Louis, Southwestern, Prefd.	74
Seaboard Air Line Col. Trust Bonds	72
United Railway Investment Co. Prefd.	70½
U. S. Rubber Rights	no value

471

IRVING L. ERNST, recalled.

By Mr. Hays:

Q. When you testified at a former hearing you gave a list of the stocks you had on hand as Receiver in this matter? A. Yes.

Q. And incorporated it into the record at pages 123 to 129, inclusive. Since that time have you offered those stocks for sale at public auction? A. I have.

472 Q. Through what auctioneer? A. Adrian H. Müller & Son.

Q. Where? A. Their office is 55 William Street; they were offered for sale at the Real Estate Exchange Room on Vesey Street, 14-16 Vesey Street.

Q. By advertisment was notice given? A. Yes, by advertisement in the New York Times and by notice to all creditors by mail, of James M. Fiske & Company.

Q. When was the sale advertised for? A. November 9th, 1910, at 12.30.

Q. Were these stocks you have enumerated then
473 and there offered for sale? A. They were.

Q. At public auction? A. Yes.

Q. By Adrian H. Müller & Company? Yes.

Q. Were there any people at the auction? A. Yes, probably a hundred.

Q. Was there bidding on the stocks? A. Yes.

Q. By more than one person? A. The bidding was very active.

Q. Will you state what prices were bid; what were the highest prices bid for the various stocks you had on hand which you enumerated on your former examination?

474 Mr. Larkin: Objected to on the ground that it is immaterial; we are only concerned with the prices and values of the stocks on the day of the failure.

The Referee: I will take it.

Exception.

A. I have it marked so it can be left here.

Q. Have you with you a printed notice or poster or catalogue, whichever you may call it, of the sale by Adrian H. Müller & Company? A. I have a printed catalogue of the sale with all the

stocks enumerated, the kind, the number of shares 475
and price at which each share was knocked down.

Q. (Handing witness paper) Is this the catalogue? A. Yes.

Q. Have you marked on the catalogue the prices which were the highest prices bid for the stock? A. I personally did not mark it, but it has been marked under my supervision.

Q. It is on this catalogue? A. It is on that catalogue.

Q. You know them to be right? A. Yes.

Q. It was done under your supervision? A. Yes.

Q. I notice you have some stocks enumerated 476
on this catalogue against which no prices were marked, but there is a cross opposite to them.

Mr. Larkin: Subject to the objection, and same ruling and exception, I consent that you put in the list.

Q. Will you explain what that means? A. Yes; all the items against which there are no prices marked, but opposite which there is a cross were offered in bulk, and the highest price bid was $73 for all of them.

Q. And the stocks which you have now referred 477
to are the stocks shown on this last page, or the second page, under your name? A. Yes.

Q. By order of Irving L. Ernst, etc.? A. Yes.

Q. Some of the figures put opposite the stocks as being the highest prices bid for them are simply figures, what does that mean? A. Starting from the United States 3% Gold Bond to and including 20 shares of International Mercantile Marine Common, the figures opposite the respective stocks denote so much per share or bond, as the case may be.

478 Q. And where you have marked per lot, what does that mean? A. It means so many shares were sold at such and such flat figure; 40 shares of St. Nicholas Skating & Ice Company, opposite which is 25, means $25 per share, and one share of Morris County Golf Club at 55, means it was sold for $55.

Q. You mean that was the highest bid? A. That was the highest bid subject to confirmation.

Q. What are the stocks against which is marked "withdrawn"? A. 1,000 shares of Oriental Gold Mining Company, 1,000 shares of Miller Gold Min-
479 ing Company, 2 shares of Bridgman Company, and $550 of Erie, and 10 shares of Sherman Bank were not included in the sale held by the Trustees.

Q. Do you still hold them? A. No, they are not my stocks at all; my stocks start with 20 United States 3% Gold Bonds and take in everything to and including 30 shares Nevada Consolidated Copper Company.

Mr. Hays: I offer the list in evidence.

Mr. Larkin: Objected to on the same ground as before.

480 The Referee: I will admit it.

Exception.

Mr. Hays: You do not object to the paper going in in place of the witness's testimony?

Mr. Larkin: Not at all. I prefer that Mr. Ernst make a synopsis of what he wants to put in and put that in.

The Referee: You can tear that right in two if you want to.

Q. What was the total? A. The total offered $13,517.70

By the Referee:

481

Q. That was the total of the sale? A. Yes. Subject to confirmation the total of the sale was $13,517.70.

Q. That is the total of the highest sum bid? A. Yes.

The paper referred to is offered in evidence, and marked Plaintiff's Exhibit 17 of January 11th, 1911.

[Printed herein at p. 400.]

HENRY H. CONE, being duly sworn and examined as a witness for the complainants, testifies as follows: 482

By Mr. Hays:

Q. What is your business? A. Member of the New York Stock Exchange.

Q. Connected with any firm? A. No.

Q. How long have you been a member? A. 12 years.

Q. Are you on the Exchange daily? A. Yes.

Q. And for how long have you been on the Exchange daily? A. The whole period, 12 years.

Q. Were you on the Exchange on the 19th of January, 1910? A. Yes. 483

Q. Do you keep yourself familiar with the market sales of stocks on the Exchange? A. In my immediate vicinity I do; I don't pretend to all over the room.

Q. What is your immediate vicinity? A. Post 16 at which was the Hocking stock.

Q. What is the correct name of that stock, the Columbus Hocking Coal & Iron Company, is that it? A. I cannot swear to the correct name of it, but that is my impression.

Q. You say your post is right near this? A. Right at the same post.

484 Q. You are there all the time? A. Yes.

Q. Were you there all the 19th? A. Up to half past one.

Q. Were you there at 12 o'clock? A. Yes.

Q. Did you observe any disturbance in your locality there on that day prior to 12 o'clock in Hocking? A. Decidedly so.

Q. Was your attention called to it? A. Yes.

Q. What was the condition of the market there on that day with respect to Hocking? A. Very panicy.

Q. Was it weak? A. Decidedly weak.

485 Q. Did you hear the price at which the stock was bought and sold? A. Yes.

Q. Have you refreshed your recollection in any way so as to be able to testify what the market price of that stock was at 12 o'clock that day? A. Yes.

Q. What was it?

Mr. Larkin: I object to that question unless we know in what manner he has refreshed his recollection; we don't know whether he has refreshed it from anything that is substantially correct.

Q. Do you know the prices on that day? A. Yes.

486 The Referee: He may testify to what the prices were that day.

A. At that time?

Q. Yes. A. Between 58 and 60.

CROSS-EXAMINATION BY MR. LARKIN:

Q. You say you have refreshed your recollection; from what did you refresh your recollection? A. I have had a distinct recollection right along.

Q. When did you refresh it? A. I refreshed it by the list.

Q. What list? A. The regular Stock Exchange 487
list.

Q. What is the regular Stock Exchange list? A. The authorized list that is printed every day by the institution.

Mr. Larkin: I move to strike out "authorized."

Q. You have been a member of the Stock Exchange how long? A. 12 years.

Q. You say that the Stock Exchange issues an authorized list of the securities sold each day? A. Yes.

Q. That is published under the authority and direction of the Stock Exchange? A. Yes. 488

Q. Who publishes it? A. I don't know whether the Exchange publishes it direct or whether it is a separate company.

Q. What makes you say the Stock Exchange authorizes it? A. Because it bears the Stock Exchange name and every reputable broker has to have his name stamped on it in order to circulate it.

Q. You are familiar with the constitution and by-laws of the Stock Exchange? A. I suppose I ought to be.

Q. Did you ever see anything in the constitution or by-laws about any such publication as that 489
being made by them? A. No.

Q. Do you know whether this so-called publication that you refer to publishes in sequence the sales of securities made during each day? A. That is the object of it.

Q. I asked you whether you know as a fact? A. No, I can't testify to that, because I am not familiar enough with the manner in which they get the list out.

Q. How are you able to say if they do not publish the prices of sales of securities in sequence,

490 how are you able to say from an inspection of that paper what the price of any particular stock at any particular time was? A. Because they have a method of printing it, I think it is every two hours; the sales between 10 and 12, and 12 and 2 and so forth.

Q. If they don't print it in sequence you can't tell at what period of time in that two hours the sale takes place? A. No; I wouldn't testify this way unless I had a very firm conviction that the price was that at 12 o'clock.

Q. Where did you get the information that gave you a firm conviction; you can't know it from that
491 publication, because you say they don't publish it in sequence?

By the Referee:

Q. Did you hear the sales made there? A. Yes, all the way down to 40.

By Mr. Larkin:

Q. Did you hear any sale made at 12.15? A. That moment?

Q. Within a few minutes either way. A. I couldn't testify to that.

492 Q. Did you hear any made at 11.30? A. My recollection is 76.

Q. Did you hear any made at 11.45? A. I wouldn't like to testify an exact time of these things, because everything was pretty well excited.

Q. You can't give any more exact information about sales made at 12 o'clock than you have as to sales made at 11.45 or 11.30? A. I think I can.

Q. How many sales were made about 12 o'clock? A. My recollection is the stock was not active between 76 and 60; after the stock broke 60, I think it broke very rapidly.

Q. If I tell you between 76 and 60 there were 493
26 sales, would that shake your belief of the information you have got from refreshing your recollection? A. Not in the least.

Q. Would you say that was active or inactive? A. Very active for that stock.

Q. I understood you to say it was inactive? A. Inactive by comparison.

Q. Comparison with what? A. With other stock; I have seen 100,000 shares sell in five minutes.

Q. They are probably companies of larger capitalization? A. Yes.

Q. How many sales were made between 11 and 494
12 o'clock that day? A. I couldn't tell.

Q. How many sales were made between 12 and 1? A. I couldn't tell you that.

Q. How near 12 o'clock did this stock sell at 58? A. In actual minutes I couldn't say; I couldn't say whether 5 minutes of 12, or 12, or 5 minutes past; all I remember is the stock was selling at between 58 and 60, because the fact was fixed in my mind by the announcement of the failure of J. M. Fiske & Company, which, if I recollect, was in the neighborhood of 5 minutes past 12; I mean of Lathrop, Haskins & Company. 495

Q. What time was that? A. About five minutes past twelve.

Q. If you had not refreshed your recollection from this so-called publication of the Stock Exchange you would have been unable to give us any more than a guess as to what the price of this stock was on the New York Stock Exchange at 12 o'clock on January 19th, 1910? A. I should have said it was 60 with a reservation, to the best of my knowledge and belief.

496 Q. You would have remembered that independently? A. Yes.

Q. That it was 60? A. Yes.

REDIRECT-EXAMINATION BY MR. HAYS:

Q. Do you remember the lowest price which that Hocking stock brought that day?

Mr. Larkin: Objected to as immaterial.

A. No.

Q. What is the lowest price that you recollect?

Mr. Larkin: Objected to as immaterial.

497 The Referee: I will take it.

Exception.

A. You mean that day?

Q. On that day. A. I couldn't tell you; I remember nothing practically after half past one, because I left the room then.

Q. Up to half past one what was the lowest price? A. The lowest price I remember seeing was 58.

Q. You were paying attention to the Hocking stock? A. Up to that time; after that I was paying attention to my own stock.

498 Q. Were you assisting Mr. Criss in any way? A. I had not up to about half-past 11.

Q. Who was Mr. Criss; what was his specialty? A. The Hocking stock.

Q. He was a specialist in that on the floor of the Exchange? A. Yes.

Q. What time did he leave the floor? A. I am not absolutely certain about that; I think it was in the neighborhood of 12 o'clock; perhaps five minutes past.

Q. You say the paper from which you have re-

freshed your memory was the paper of the New York Stock Exchange? A. Yes. 499

Q. (Handing witness paper.) Was that the paper you referred to? A. Yes.

Q. Does every broker on the Stock Exchange receive a paper like that daily?

Mr. Larkin: Objected to as immaterial.

The Referee: He may answer.

Exception.

A. Yes.

Q. Every broker on the Exchange? A. That is that wants it. 500

Q. Is his name stamped on them? A. If he uses them or exposes them in anyway.

Q. Are these used on the Exchange? A. Yes.

Q. By brokers? A. Yes.

Q. And referred to generally by brokers? A. Yes.

Q. Are they generally accepted as correct? A. Yes.

Q. Are they used for the purpose of ascertaining at any time on a given date the price at which each stock sold?

Mr. Larkin: Objected to as immaterial and incompetent. 501

By the Referee:

Q. They are generally used among brokers: A. Yes.

Recross-examination by Mr. Larkin:

Q. Did you ever use these? A. Personally?

Q. Yes. A. Yes.

Q. Where did you order them from? A. I have forgotten the man's name.

502 Q. It is a Stock Exchange publication, you claim, isn't it? A. It is published by—I think his name is Fitch.

Q. Do you know that he has any direct authority from the New York Stock Exchange to publish this as an official list of stocks? A. No, I don't.

Q. That is a guess on your part? A. Yes.

Q. You say the lowest price at which Columbus & Hocking Coal & Iron stock sold up to 1.30 when you left the Exchange was 58? A. The lowest price I remember.

Q. If I were to say to you that between say 12.45
503 and 1.15 the stock varied in price from 32½ to 43¾, would that information surprise you? A. No.

Q. You were right there, that was your post? A. I was right around the corner.

Q. But at that post? A. Yes.

Q. You were observing these things? A. I was observing my own stock.

Q. Were you observing your own stock during the period of time I have just called your attention to any more particularly than you were around 12 o'clock? A. Yes, because my stock did not begin to get active until then.

504 Q. What was your stock? A. St. Louis & San Francisco, Minneapolis & St. Paul, and Sault Ste. Marie.

Q. You spoke about Mr. Criss leaving the floor; did you see him leave the floor? A. Yes.

Q. Did he leave of his own motion? A. Of his own motion?

Q. Yes. A. No, not exactly; I think he was taken out, really.

Q. You saw him taken off the floor, didn't you? A. Yes.

Q. Do you know who did it? A. Yes.

Q. Who were they? A. Mr. DeHaven, W. B. 505
DeHaven.

Q. Do you know why he did it? A. Yes.

Q. Why? A. Because they thought he was having a stroke of apoplexy.

Q. The price of Columbus & Hocking had nothing to do with his removal? A. I think possibly the two, the combination; one produced the other, I suppose.

Q. Isn't it a fact that you have no recollection of the quoted price of this stock other than that you have refreshed your recollection from this list, and based upon what you remember from having seen 506
this list you are testifying here? A. No, I can't allow that.

Q. How near can you allow? A. Just as I say, my very firm conviction of the price is that it was in the neighborhood of 60; it might have been 58 or 62.

By Mr. Hays:

Q. Having refreshed your recollection you say you think it was between 58 and 60? A. Yes.

Q. You used the word 62 a minute ago? A. I didn't mean to.

507
The Referee: He said if he had not refreshed his recollection he would have said that.

Q. If you had not refreshed your recollection you would have thought between 58 and 62? A. In the neighborhood of 60.

Q. You testified a moment ago between 58 and 62? A. That is precisely what I mean; a stock that fluctuates as violently as that I would not say 60 at 12 o'clock or 62 at 12 o'clock or 58 at 12 o'clock.

508 PERLEY MORSE, recalled, testifies as follows:

By Mr. Wolf:

Q. Are you familiar with the values of the stocks, bonds and securities which have been agreed to by counsel for the defendant and inserted in the record as the values of the stocks, bonds and securities which J. M. Fiske & Company were buying and selling for their customers on the 19th of January, 1910? A. Yes.

Q. At 12 o'clock that day? A. Yes.

509 By Mr. Hays:

Q. Taking those values, have you made a computation of the assets and liabilities of J. M. Fiske & Company as of January 19th, 1910, at 12 o'clock? A. Yes.

Mr. Larkin: Objected to as immaterial and incompetent because of necessity it must involve examination of the books and calculations made from figures from those books, and the books have not been proved; we have no legal means of arriving at what was the state of J. M. Fiske & Company at that time.

510 The Referee: I will let him answer.

Mr. Larkin: There is no evidence before us that enables him to make any such computation; we have only agreed that certain securities which it is claimed constitute a part of the estate may be taken as of certain figures at a certain time on that date, January 19th; that is all we have done.

The Referee: I suppose he has done just about what the Court could do on the testimony; that is what I assume when I admit the testimony.

Mr. Larkin excepts.

A. The differences in prices before and after twelve—— 511

Mr. Hays: I didn't ask that.

Q. Taking these prices that have been agreed on—— A. There is a difference of about $2,000.

Q. From the testimony you previously gave? A. Yes.

By Mr. Wolf:

Q. Give us the assets and liabilities as of 12 o'clock based on the figures that have been agreed upon as the valuation of the stocks, bonds and securities? 512

Mr. Larkin: I renew my objection on the ground that that of necessity requires the witness to testify from books that have not been proven or offered in evidence.

The Referee: You can cross-examine him now if you want to. I will let him answer the question.

Exception.

A. The assets, $745,919.48; liabilities, $904,570.02; excess of liabilities $158,650.54; taking in consideration the $2,000 difference in pricing it makes the excess of liabilities $156,650.54.

By Mr. Hays: 513

Q. In that statement you have included, as I understand it, all of the accounts on the books against various debtors as being *prima facie* good? A. Yes.

Mr. Larkin: Same objection.

Same ruling and exception.

Q. You have taken the accounts which you found on the books at their face value?

Same objection, ruling and exception.

A. Yes.

514 By Mr. Wolf:

Q. In figuring the assets of J. M. Fiske & Company, at what price was the Hocking stock figured? A. 58.

Q. How many shares of Hocking stock did the firm of J. M. Fiske & Company carry for its customers or have for its own account?

Mr. Larkin: Objected to on the ground that it must be that this information was derived solely from the books and is not the best evidence.

Objection overruled.

515 Exception.

A. 9,740 shares.

Q. You have spoken of a difference of $2,000 which you say you have taken into computation in the estimation of the assets and liabilities. Will you explain what that $2,000 is? A. It is one-eighth——

Q. Can't you explain what it is without going into the figures at all; show how it comes about? A. In making up the statement of assets and liabilities we took the prices immediately after 12; some of these prices were objected to, and those that
516 were objected to, in figuring the fractions which would be the difference before 12 and after 12, amount to about $2,000.

Q. In other words, you have taken the figures furnished by Counsel for defendant in those cases where those figures did not coincide with your own, and that has resulted in an increase in the assets of $2,000? A. Yes.

Q. Those are the figures which were agreed upon? A. Yes.

Q. In your computation of the assets of the firm of J. M. Fiske & Company what have you included?

A. All the accounts as shown on the ledger with the exception of those accounts of the members of the firm. 517

Mr. Larkin: I object to the question and move to strike out the answer for the same reason as before, that it is immaterial, irrelevant and incompetent.

Objection overruled and motion denied. Exception.

Q. Have you also included all the other assets of J. M. Fiske & Company as shown by the books of J. M. Fiske & Company? A. Yes.

Q. You say you have included all the accounts due to J. M. Fiske & Company from its customers as being worth 100 cents on the dollar? A. Yes. 518

Q. Have you included the account of George S. Andes? A. Yes.

Q. And Alexander Conried $1,558.65, a note? A. No.

Q. Have you included the claim against John Felix for $33,652.74? A. What is the amount again?

Q. $33,652.74. A. Yes.

Q. The figures I am reading are the indebtednesses apparently due to J. M. Fiske & Company? 519
A. Yes.

Q. And that is the value placed on the claim in computing the assets? A. Yes.

Q. J. M. Fiske & Company No. 2 account, did you include that or exclude it as a firm account? A. Excluded.

Q. Pool No. 2 or Four Fourths account, $167,840.79? A. That is included.

Q. Included in your computation of the assets? A. Yes.

Q. C. C. Fulton $2,228.81? A. Included.

520 Q. E. L. Gilbert, $12,766.58? A. Yes, included.

Q. L. D. Hopkins, $1,157.23? A. Yes, included.

Q. Dudley T. Humphrey, $10,839.69? A. He is a member of the firm; not included.

Q. Lathrop, Haskins & Company, $104,416? A. I have only $40,000 of that.

Q. What amount have you included? A. $40,773.68.

Q. Berth Levy Pool No. 1 account? A. In closing that account out it is a liability.

Q. So that is excluded? A. Yes.

Q. Robert F. Little? A. Yes, I have included
521 that.

Q. For what amount? A. His special account, $14,269.72.

Q. And his No. 1 account? A. $13,973.84.

Q. Any other account? A. That is all of his account.

Q. Charles McLane? A. $8,874.46.

Q. Included? A. Yes; he also has a grain account of $52.50 which was included.

Q. A. P. Morison? A. A. P. Morison, $34,732.69.

Q. Included? A. Included.

Q. A. P. Morison No. 9? A. $34,292.40.

Q. Included? A. Yes.

522 Q. A. P. Morison privilege account? A. $67,083.20.

Q. Anything else under Morison? A. No.

Q. Was that included in the assets, that last amount? A. Yes, that is included.

Q. Albert C. Roberts? A. $924.57, included.

Q. Marcus Schnitzer? A. $14,876.84, included.

Q. J. B. Sheppard? A. $637.03, included.

Q. Sarah L. Stevens? A. $3,817.20, included.

Q. Martha L. Stevens? A. $3,836.21, included.

Q. Harry E. Stevens? A. $4,348.83, included.

Q. G. T. Sullivan accounts? A. His cotton ac-

count, $5,840; his grain account, $25,610.50, in- 523
cluded.

Q. All of those included? A. Yes.

Q. Charles F. Tannehill? A. Is that on notes?

Q. No. A. $4,688.79, included.

Q. C. M. Washburn, is that included or excluded? A. Excluded.

Q. He was a member of the firm? A. Yes.

Q. So to the extent of the accounts which we have read off that prove uncollectible that must be deducted from the estimation you have made of the assets of the firm? A. Yes. I wish to correct my testimony there. As to C. M. Washburn, while he 524
is a member of the firm, in two of his accounts he carried stock, so I closed those accounts out as though he were a regular customer, and I have included in my figuring of assets C. M. Washburn, $21,559.42; on his special account, $4,422.71.

Q. Have you computed that in the estimation of the assets? A. Yes.

Q. What is the total of that? A. There are two accounts, $21,559.42 and $4,422.71.

CROSS-EXAMINATION BY MR. LARKIN:

Q. You got this information you have just testi- 525
fied about largely from the books of J. M. Fiske & Company? A. All from the books of J. M. Fiske & Company.

Mr. Larkin: I move to strike out on the ground it appears the witness's information is derived from the books which have not been proved, and there is nothing to show they are correct or that he is entitled to give evidence until they are proved, and I object as immaterial, irrelevant and incompetent.

The Referee: Motion denied.

Exception.

Mr. Hays: We have identified the books.

526 REDIRECT-EXAMINATION BY MR. HAYS:

Q. The books which were identified here by Mr. Fiske and Mr. Isaacs, the bookkeeper, and by Mr. Humphrey were the books you examined? A. Yes.

Q. Of Fiske & Company? A. Yes.

Mr. Larkin: I renew the objection on the ground the witness testified about books not in evidence.

Objection overruled.

Exception.

Mr. Hays: I offer the books of J. M. Fiske & Company in evidence that have been identified.

527 Mr. Larkin: Objected to on the ground that the books have not been legally or properly proved, and are immaterial, irrelevant and incompetent.

The Referee: I will take them.

Mr. Larkin excepts.

Q. You produce a book; what is that? A. The private ledger of the firm of J. M. Fiske & Company.

The above book is offered in evidence and marked Plaintiff's Exhibit 18 of January 11th, 1911.

[Not printed by consent. See pp. 3 and 402.]

528 Mr. Larkin: I object to the production of each exhibit to be offered on the same ground as heretofore stated.

Same ruling and exception.

Q. I show you Plaintiffs' Exhibit 12 for Identification of November 4th, 1910, and ask what that book is? A. J. M. Fiske & Company's customers ledger A to K.

The above book is offered in evidence and marked Plaintiffs' Exhibit 19 of January 11th, 1911.

[Not printed in full by consent. See p. 3. Extract printed at p. 402.]

Q. I show you Plaintiffs' Exhibit 13 for Identification of the same date and ask what that is? A. J. M. Fiske & Company's customers ledger L to Z. 529

The above book is offered in evidence and marked Plaintiffs' Exhibit 20 of January 11th, 1911.

[Not printed by consent. See pp. 3 and 402.]

Q. I show you another ledger and ask what that is? A. J. M. Fiske & Company's commodity ledger containing transactions in grain, cotton and so forth.

530

The above book is offered in evidence, and marked Plaintiffs' Exhibit 21 of January 11th, 1911.

[Not printed by consent. See pp. 3 and 402.]

Q. I show you Plaintiffs' Exhibit 14 for Identification of the same date as the others, and ask what that book is? A. This is the purchase and sales book of J. M. Fiske & Company.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 22 of January 11th, 1911.

[Not printed by consent. See pp. 3 and 402.] 531

Q. What is the book of account now shown you? A. The blotters of J. M. Fiske & Company.

Q. From what date to what date? A. January 3rd to January 19th, inclusive.

Q. 1910? A. Yes.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 23 of January 11th, 1911.

[Not printed in full by consent. See p. 3. Extracts printed at pp. 403-415.]

532 Q. I show you another book and ask you what that is? A. That is the stock record of J. M. Fiske & Company.

Q. Beginning with what day? A. This is a continuation record; there is no date.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 24 of January 11th, 1911.

[Not printed by consent. See pp. 3 and 416.]

Q. I show you another book and ask what that is? A. This is the borrowed and loan book of J.
533 M. Fiske & Company.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 25 of January 11th, 1911.

[Not printed by consent. See pp. 3 and 416.]

Q. I show you apparently a check book of stubs and ask what that is? A. This contains the stubs of the Mechanics National Bank check book.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 26 of January 11th, 1911.

534 [Not printed in full by consent. See p. 3. Extracts printed at pp. 416-417.]

Q. Up to what date does that go? A. November 26th.

Q. Begins you mean? A. Begins November 26th, 1909, and goes up to January 3rd, 1910, is the last date I see here.

Q. I show you another book which has been already marked Plaintiffs' Exhibit 16 for Identification of the same date as the others beginning January 3rd, 1910, and ask you whether that is one of the books you examined? A. This is the Mechanics National Bank check book of the firm

of J. M. Fiske & Company from January 3rd, 1910, to January 19th, 1910, inclusive. 535

The above book is offered in evidence, and marked Plaintiffs' Exhibit 27 of January 11th, 1911.

[Not printed in full by consent. See p. 3. Extracts printed at pp. 418-426.]

Q. I show you another book of stubs and ask you what that is? A. This is the stubs of the check book of the Mechanics National Bank, and belonged to the firm of J. M. Fiske & Company, from October 20th, 1909, to November 26th, 1909.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 28 of January 11th, 1911. 536

[Not printed by consent. See pp. 3 and 427.]

Q. I show you another book of checks and stubs on the Mechanics & Traders Bank; is that one of the books of J. M. Fiske & Company? A. Yes, from November 11th, 1907, to December 20th, 1907.

The above book is offered in evidence, and marked Plaintiffs' Exhibit 29 of January 11th, 1911. 537

[Not printed by consent. See pp. 3 and 427.]

Recross-examination by Mr. Larkin:

Q. The figures you have given us as to the assets and liabilities do not agree with the figures given at the former hearing? A. There are some adjustments made on account of change of price.

Q. They disagree both as to assets and liabilities? A. Yes, slightly.

Mr. Larkin: I move to strike out "slightly."

The Referee: Strike it out.

538 Q. In your estimation of assets what value have you placed on the cause of action which the Receiver claims he has against J. R. Keene; have you taken that into consideration? A. No.

Q. Are there any other choses in action which you know of which you have not taken into consideration? A. Only the Mechanics & Metals National Bank.

Q. You have not taken that into consideration? A. No.

Q. Will you please make up a statement of what the assets and liabilities of this estate are and let
539 us have it at some time. You have been offering books here and describing them as the books of J. M. Fiske & Company; had you any familiarity with the books prior to the 19th of January, 1910? A. No.

Q. You don't know what books they had on the 18th of January? A. No.

Q. These books you found in the office there? A. Yes.

Q. That is all you know about them, isn't it? A. I found them in the office and I know——

Q. That is all you know about them? A. No, I know they are books of the firm because they
540 matched past transactions right straight through.

Mr. Larkin: I move to strike that out as not responsive.

The Referee: I will let it stand.

Exception.

Adjourned to Wednesday, January 18th, 1911, at 10.30 A. M.

NEW YORK, March 9th, 1911. 541

Met pursuant to adjournment.

PRESENT:

THE REFEREE;

MR. WOLF for the plaintiff;

MR. LARKIN and MR. GARRETSON for defendant.

JOSIAH M. FISKE recalled.

By Mr. Wolf:

On the 19th of January, 1910, what was the value of your individual assets excluding your interest in the firm of J. M. Fiske & Company? A. Just as shown in the schedules as filed with the referee. 542

Q. How much does that amount to? A. I couldn't tell you.

Q. Well, approximately? A. I don't know.

Q. Was it less than $5,000? I couldn't tell you.

Q. The amount shown in the schedules is correct? A. It is.

543

CROSS-EXAMINED BY MR. LARKIN:

Q. Were there any omissions in the schedules filed? A. No.

Q. And they correctly describe all interest of any kind and nature that you had in any property, real or personal? A. I believe they do.

Q. Have you any doubt about it? A. Not that I know of.

Q. Did you ever file any amendments to the original schedules? A. Yes.

544 Q. What was the occasion of that? A. Owing to omissions in the original schedules.

Q. Do you recall what you omitted? A. An interest in an estate.

Q. Whose estate? A. An uncle's.

Q. Who called your attention to the fact that that had been omitted? A. I remembered it myself.

Q. What is the name of the estate? A. Josiah M. Fiske.

Q. Your uncle? A. Yes.

Q. The same name? A. Yes.

545 Q. Was that an interest in real or personal property? A. I think there was some of both.

REDIRECT-EXAMINATION BY MR. WOLF:

Q. I think I have the schedules here. (Producing schedules.) Look at the schedule that I now show you, being one of the original schedules filed by you in bankruptcy, and tell me what the amount of your individual assets was on January 19th, 1910.

Mr. Larkin: Let the schedule speak for itself; I want it in evidence.

546 The paper produced shows a total of $5,118.89 assets.

Q. Is that the amended one? A. That is not a true statement; I mean literally true; there are several items whose value is given as unknown.

Q. What was their value? A. I think the two boats, I have given their value as unknown.

Q. What was the value of the two boats? A. I couldn't tell you; the receiver sold them.

Q. Were they worth $1,000? A. I believe the two brought over that.

Q. Were they worth $2,000? A. I don't think

they brought as much as that; not as I remember 547
the figures.

Q. What was the value of the interest in the real estate covered by the amended individual schedule that you filed? A. I couldn't tell you.

Q. Have you any recollection of what the amount was? A. Not at the present time.

Q. I show you the original amended schedule filed by you, and ask you if you can refresh your recollection by looking at that, and tell what the value is?

Mr. Larkin: If he testifies from the paper it should be put in evidence. 548

The Referee: He can refresh his recollection. You can ask him what the items were, or you may put it in evidence yourself.

Q. Looking at the original amended schedule filed by you, can you tell what the value of the interest in the real estate from the original amended schedule was? A. No; the value isn't given.

Q. Was it in excess of $2,000, or less than that? A. I can't state positively what the fact is or was; those things were taken over by the receiver.

Q. Can you state whether the value was less 549
than $5,000? A. I would not care to place any valuation on it whatever.

Q. Was it less than $10,000? A. I don't feel competent to state any valuation.

Q. It represented an interest of how much in the estate of your uncle; what proportion, percentage? A. I can't state that.

By the Referee:

Q. Don't you know whether it was a 1/2 or 1/100? A. It was a fraction of 1/14, and I have

550 had part of that, and it gets to be a pretty small item.

Q. You will have to look that up and come back again and testify, if you can't give any valuation of it at all. Do you recall what a similar fractional share was sold for, or purchased for?

Objected to as immaterial.

Objection sustained.

Exception.

RECROSS-EXAMINATION BY MR. LARKIN:

551 Q. This paper that was first shown you by Mr. Wolf is the original schedule which you filed under a petition bearing date May 2nd, 1910, and signed by you, is it? A. It is one of the originals; I think I have signed three or four copies; I have forgotten which; it is one of the originals.

Q. I show you a paper and ask whether that is the original schedule that you filed in bankruptcy, as an individual? A. I think it is.

Q. Will you look at the end of it and see if that is your signature? A. It is.

Q. That is your signature to that particular portion of the schedule; look at the end of it? A.
552 My signature is all the way through.

Q. I wish you would point out to me where in that schedule there is any statement that is not accurate? A. There is no statement in there that I have made that is inaccurate, so far as I am concerned.

Q. Then it is only a question of omission that necessitated——. A. No; it is not a question of omission; it is where I did not know the value of the thing I put "value unknown," and value unknown does not figure in the total; only known values are carried forward, as to values.

Mr. Larkin: I offer in evidence the schedule. 553

It is marked Defendant's Exhibit A[1] of this date.

[Printed herein at pp. 455-466.]

Q. The paper that I showed you previously, which is annexed to the petition dated May 2nd, 1910, is your amended schedule, is it not? A. It is.

It is offered in evidence.

It is marked Defendant's Exhibit B of this date.

[Printed herein at pp. 467-471.]

Q. In this paper, Exhibit B, you say in examining schedule B, your petitioner finds that he has overlooked a possible interest in the Estate of Josiah M. Fiske belonging to your petitioner. Is it not a fact, therefore, that one of the reasons for filing this amended schedule was an omission, and not as you have stated, that you placed no value on certain items? 554

The Referee: That is what he said first.

Mr. Larkin: He changed it afterwards.

A. I don't quite follow your question.

Q. You testified in answer to questions by Mr. Wolf that you omitted an item or certain items and that your amended schedule included those items. You testified in answer to a question by me that the reason for filing the amended schedule was that you had given no value to certain items, and that your amended schedule gave values to some of those items. Which statement is correct as to the reason for filing the amended schedules? A. I think I made the statement that some of the figures shown in the schedules did not represent quite the true value, because some values were unknown. 555

556 By the Referee:

Q. That is, you filed your amended schedule to include the share in your uncle's estate? A. Yes.

By Mr. Larkin:

Q. So that the statement in the petition annexed to the amended schedule, Defendant's Exhibit B of this date, that you have overlooked a possible interest is inaccurate, is it? A. In testifying here I did not draw the distinction between overlooked and omitted.

Q. Well, what is the difference, as you understand it? A. I should think that overlooked was
557 a matter of—of well——

Q. Well, point out to me in the original schedules where there is any reference to the interest in the Estate of Josiah M. Fiske? A. There is no reference; the amendment covers it.

By the Referee:

Q. In the original schedules some of the values you put down there were not correct, because you did not know what the values were? A. No; I gave "value unknown" because I didn't know what the value was; there was some value.

558 Q. In the original schedules you gave "value unknown" as to properties that you were not informed about the value of; you didn't make any mention in that original schedule of the interest in your uncle's estate? A. That is right.

Q. Then you filed an amended schedule for the purpose of including the interest in your uncle's estate? A. Yes.

Q. And did you supply in this amended schedule the valuations that you omitted? A. No.

By Mr. Larkin: 559

Q. In your original schedule under the heading of "Schedule A, No. 3, creditors whose claims were unsecured" you have Caroline W. Fiske; residence, 205 West 70th street, New York City; money loaned, $79,193.81. Who is she? A. My mother.

Q. When did she lend you this money? A. From time to time, as long as I have been in Wall street.

Q. Did you give her a note or any evidence of the debt? A. No security.

Q. When did she begin to lend you money, and about when was the last time she lent you money, and state the different items constituting this prin- 560
cipal amount of $79,193.81. A. The money was loaned to me when I first went into business, by her.

Q. All then? A. Some of it.

Q. How much and when? A. I don't remember the figures.

Q. When did you first go into business? A. I think it was in February, 1893; I think that was the time.

Q. You have no idea of the amount she loaned you at that time? A. I couldn't tell you exactly.

Q. Well, can you tell me approximately? A. I think it was about $10,000. 561

Q. You figure it was about $10,000? A. I think it was about $10,000.

Q. And you gave her no memorandum or any record of any kind? A. She has nothing in the way of security; simply rendering an account to her.

Q. You gave her no writing or memorandum of any kind to evidence the fact that this money was handed to you at that time? A. Nothing, except sending her an account, as her account stood with me.

562 Q. And you did send her an account from time to time? A. Yes.

Q. When did you begin doing that? A. About the time that we had business dealings together.

Q. That was back in 1893? A. I think it was in 1893.

Q. Did you carry that account in any book or books that you then kept? A. I have always carried it; it has been either in my personal book or the firm books.

Q. Have you an account in the firm books showing an indebtedness to her? A. I think she has a
563 claim of $10,000 against the firm in addition to this.

Q. I am asking you about this item of $79,193.81. Is there any entry in any of the firm books showing an account of this amount, or any amount, between your mother and yourself? A. Of this amount, no; of any amount, yes.

Q. You haven't the books here, have you? A. No.

Q. Have you seen it yourself, on the books? A. Such an account is on the books.

Q. Do you know what the amount of it is as it appears on the books? A. I think it is $10,000, as
564 I remember; it is in the schedule.

Q. So that your firm books only note an indebtedness of yourself or your firm to your mother? A. That is the firm to my mother.

Q. Is that $10,000 included in this $79,193.81? A. No.

Q. I want to direct your attention to this amount of $79,193.81, and ask you whether there is any entry in respect of that, or any portion of it in your firm books? A. Portions of them run through my own personal accounts.

Q. I asked you about the firm books? A. No;

there will be entries in my own personal account 565
in the firm books that will correspond to many items of her account.

Q. You mean by that that there are entries? A. In my personal account, that correspond to many items of her account.

By the Referee:

Q. The question is: is there any account on the firm books of any of this? A. No, not in connection with Caroline W. Fiske; many of the items were in my account in the firm books.

By Mr. Larkin: 566

Q. You said you had personal books which they appeared in? A. I have kept a little ledger.

Q. Have you got that still? A. It is in the safe, the Receiver has it.

Q. Are there entries in that personal ledger showing this amount of indebtedness to your mother? A. I couldn't testify absolutely as to that, whether those books were written up completely or not.

Q. But you do remember that there is an account between your mother and yourself appearing in your personal ledger? A. Yes.

Q. Do you remember now the total amount as 567
shown on your personal books? A. As shown here.

Q. That is your recollection of it? A. Yes.

Q. After this first $10,000 was loaned in 1893, as I understood it, when was the next loan made by your mother? A. The subsequent dealings were a matter of accounts.

Q. What do you mean by that? A. Purchase of stock, sales of stock, stock deposits to be sold and money left with me.

Q. And that all appears in your personal ledger? A. I don't know as I have kept my own books the

568 way they should be kept, but I know that part of the time the account has been in the firm books, and they were properly kept then.

Q. But your personal book shows, according to your recollection, that you owed your mother $79,193.81? A. Yes.

Q. That indebtedness except for this $10,000, as I understand you, covers all transactions of hers; purchase and sale of stock? A. Yes.

Q. What had the firm to do with that? A. The firm had nothing to do with it.

Q. Does your individual book show these stock
569 transactions with your mother? A. I couldn't say absolutely; I kept my book more as a personal memorandum than as a regular bookkeeping business.

Q. What stocks did she buy and sell? A. I couldn't tell you off hand.

Q. Do you remember any other advances in cash that she made to you besides $10,000; the first $10,000 advance made in 1893? A. The first $10,000 wasn't in cash.

Q. What was it in? A. She let me have securities to approximately that value; she loaned me approximately $10,000.

570 Q. She didn't loan you $10,000; she handed you securities of that value, in 1893? A. Yes.

Q. And those you took and used? A. Yes.

Q. And those you have never returned to her? A. I don't know whether they have been sold or not; those particular ones.

Q. You never have returned them? A. No, she has never received them back.

Q. At any time during this period from 1893, when she began loaning you securities, did she ever loan you money? A. I don't remember.

Q. Do you remember of her ever loaning you

any other or further securities? A. She has sent 571
securities down which have been sold, and the moneys remained in the office.

Q. And this account then stands made up of the items of securities loaned you; securities sent to you for sale, and the money has never been delivered to her—— A. Part of it has, and part of it has not, according as she desired.

Q. And the balance is made up of other transactions; what were the other transactions? A. Purchases and sale of stocks.

Q. She would order you to buy for her account certain shares of stock or certain bonds, and you would buy them? A. Yes. 572

Q. And pay for them out of your own moneys? A. Yes.

Q. And then she would order the sale of these shares? A. Yes.

Q. And the net result of these transactions showed that you owed her upwards of $79,000? A. Yes.

Q. Have you any book or ledger of any kind that will show all of these transactions? A. I think I could go through my books, and pick them all out.

Q. You have books that will enable you to do 573
that? A. Yes, I think so.

Q. What are those books? A. The firm books and the ledger, that I kept.

Q. But we are speaking of your own personal books? A. Simply the ledger that I kept.

Q. It has got to be in the ledger? A. Yes.

Q. How did you arrive at this figure of $79,000 and upwards? A. By closing out the stocks that she had with us, according to the methods that were used by the expert accountant.

Q. At the time of the failure of J. M. Fiske &

574 Company your mother had certain stocks on hand? A. Yes.

Q. That were not pledged? A. Yes— no, I don't say that; whether they were pledged or not, I don't say.

Q. Well, I ask you whether they were pledged? A. I think they were.

Q. And you closed them out in what way? A. Using exactly similar methods——

Q. Won't you tell me what the way was? A. I don't know as I can remember the absolute details at the present time; it was over a year ago.

575 Q. You don't remember the method employed to arrive at the value of the securities that she had on hand? A. I have forgotten whether it was the closing price exactly, or the average price for the day; but I used the same methods that the expert accountant used in closing out the other accounts.

Q. And you were able to find from your books and the books of your firm all the entries necessary to make up the $79,000? A. Yes.

Q. And is there any interest included in it? A. Yes.

Q. Interest on daily balances, or how was the interest figured? A. At the end of the year, as I

576 remember.

Q. Did you figure the interest yourself? A. I either figured it, or checked it.

Q. So that you personally arrived at this figure? A. Yes.

Q. Has your mother ever demanded the payment of this money? A. No.

Q. Has she ever at any time since 1893 demanded payment of her account? A. Not that I know of.

Q. You think you just owe her this money? A. Yes.

Q. Has any claim been interposed in bankruptcy on her behalf, that you know of? A. I think it has. 577

Q. Referring again to your original schedule filed, Defendant's Exhibit A of this date, there is an entry under the heading B-1 "real estate owned by debtor or held by him, Josiah M. Fiske, none." That was the schedule that you subsequently amended, was it not, by your amended schedules? A. You have the papers there.

Q. I am asking you, Mr. Fiske? A. The original schedule was amended; if you mean by schedule, taking the whole thing as one, or if you mean the single item— 578

Q. I mean was that item amended? A. Not that I know of.

Q. You owned no real estate at the time, the 19th of January, 1910? A. No.

Q. Other than this interest in your uncle's estate? A. I don't own any real estate.

Q. And you own no household goods, furniture, household stores, and wearing apparel or ornaments, is that correct? A. I have a little wearing apparel; outside of that, nothing.

Q. You own no household goods or furniture or household stores, or ornaments personal to you; 579 is that correct? A. I have a few things such as I am wearing; that is all there is to it.

Q. You have no household goods and furniture? A. No; that belongs to my wife; the furniture always has belonged to her. The house belonged to her, that I lived in.

Q. Under the items mentioned in Schedule B-2 "personal property" under the heading "Books, prints and pictures"; your schedule shows that you have none; is that correct? A. I think it is correct.

580 Q. Why do you think? A. There may be some few books that I have had from time to time when I was a youngster.

Q. But you have never bought any books since you have been a youngster? A. I have never bought any books, except perhaps magazines, or something of that kind; I have never had any taste for books.

Q. Have you never had any prints or pictures? A. No, the only painting that I owned was down in the office, and that was sold; that was sold by the Receiver; I am afraid I didn't make a memo-
581 randum of that, but he received the money.

Q. Did you have a country place? A. No.

Q. Did you live in New York in the summer? I rented a house in the summer in the country.

Q. So you did have a country place, didn't you? A. No, I rented it; I didn't own it.

Q. But you occupied a country place in the summer? A. I rented one and occupied it.

Q. You took the lease in your own name, or was it in your wife's name? A. I think the lease was in my name.

Q. Did you have any personal property at that place during the summer? A. No, the house was
582 closed and we moved out; our lease was up in the fall.

Q. Where was that place? A. At Sea Gate, Coney Island; our lease ran there to something like the 1st of November, and we moved out; it was a summer lease.

Q. Under the item "Carriages and other vehicles"; you say "one automobile?" A. That is all.

Q. Is that the only vehicle of any kind that you had; no horses or carriages? A. No horses or carriages.

Q. Was that the only automobile that you had? 583
A. It was.

Q. Under the item still in Schedule B-3 "Debts due petitioner on open account"; Buckhout Davis & McLellan $751.80; was that the only debt due you? A. If it was the only one scheduled there it was the only one due me.

Q. Independently of whether it is or not, is it the only one due you, as far as you can recollect? A. As far as I can recollect, yes.

Q. Have you any books that show all of the indebtedness to you from the time that you started in business up to January 19th, 1910? A. I don't 584
think there is any money due me that wasn't charged—

Q. I ask you if there are any books that will show? A. If you will give me an opportunity to answer the question I will try to do so.

Q. I want you to answer the question directly. A. I am trying to answer—

Q. I want a direct answer, and not that you should answer in your own way. A. Yes.

Q. What is that book called? A. The books of J. M. Fiske & Company.

Q. You have no personal books that show such transactions? A. No. 585

Q. So that any money of any kind that is owed you by any person will appear upon the books of J. M. Fiske & Company? A. Yes.

Q. When was the firm of J. M. Fiske & Company formed? A. About 1897, I think.

Q. In your amended schedule there appears this entry under the heading of "General interest"; "Property in money, stocks, shares, bonds, annuities, etc. Rights and powers, legacies and bequests"; and there is a statement "Possible con-

586 tingent interest in the Estate of Josiah M. Fiske." That is correct, is it not? A. Yes.

Q. Josiah M. Fiske was your uncle? A. He was my father's uncle.

Q. I understood you to testify earlier that he was your uncle? A. I perhaps a little earlier didn't draw the distinction.

Q. I just want the facts. A. I think this time the question is asked explicitly, and I want to explain.

Q. I only want the facts; what was this possible contingent interest in the Estate of Josiah M.
587 Fiske; what was the contingency on which it depended? A. If I lived I supposed I was going to get it; if I didn't live it would probably go to my heirs.

Q. If you lived how long? A. Till the thing was settled up.

Q. What thing? A. The estate.

Q. So that if the estate was settled to-day is it just the physical act of doing the working necessary to state the accounts that would enable you to take under your uncle's will? Do you understand that question? A. I don't exactly catch what you mean.

588

By the Referee:

Q. Did he leave a will? A. He did.

Q. Did he give the property to you? A. I was given an interest in the property and I inherited through my father.

By Mr. Larkin:

Q. Is your father alive? A. No.

Q. Did he have a life interest in it? A. He did.

Q. The remainder went over to whom? A. His heirs.

Q. Are you one of them? A. I am. 589

Q. Have you any brothers and sisters? A. I have.

Q. How many? A. Two brothers and one sister.

Q. So that your interest has vested, but hasn't been distributed? A. I think so; I am not a lawyer.

Q. But I am asking for the facts; you get an income from it from time to time, don't you? A. Not through my father's interest, no.

Q. I am not speaking of that; I am speaking of the general interest of your brothers and sister in this estate? A. I made a statement that I inherited through my father, and then you asked me if I received an income from that. No, I do not; that was the way I understood your question. 590

Q. If you will follow my questions—— A. I am trying to.

Q. You receive income from the estate of your father's uncle, do you not? A. I do.

Q. How often do you receive it? A. About quarterly.

Q. How much do you receive each quarter? A. It varies in amount.

Q. Well, the last quarter? A. $500 odd.

Q. How much did you receive the quarter before? A. I don't remember; about the same. 591

Q. How much did you receive the quarter before? A. It runs about five hundred and some odd dollars.

Q. And your share is what percentage of the total. A. I have one-fourteenth of the income.

Q. And you have parted with a portion of that, have you? A. Not that I know of.

Q. Didn't you say a moment ago that you had one-fourteenth, and a portion of that had ben paid you? A. I have an interest in one-fourteenth; a

592 portion of which had been paid me; but that was a different one-fourteenth.

Q. So there is another one-fourteenth; so besides the one-fourteenth you say now that you have another one-fourteenth interest under that estate; is that it? A. I have.

Q. I ask you to tell me what your percentage of your father's uncle's estate is? A. I have the income from one-fourteenth of the income of the estate; I have inherited through my father a quarter of one-fourteenth of the principal less his widow's dower right; I think that states it.

593 By the Referee:

Q. This share that you receive the income of, are you to receive that under the will during your lifetime? A. Yes.

Q. Then where does it go? A. The principal goes to my heirs.

By Mr. Larkin:

Q. That is the first one-fourteenth that you mention? A. That is the income.

Q. About the other one-fourteenth; is that dependent upon any life? A. No, I think not; it
594 came to me owing to my father's death; my father had one-fourteenth.

By the Referee:

Q. That you are entitled to receive, whenever they are ready to pay it? A. Yes; then I purchased an interest of a cousin of mine.

By Mr. Larkin:

Q. The only thing that stands between your getting that is an accounting by the trustees?

A. No, it is a sale of some property.

Q. And when you said you were waiting for the matter to be settled up you meant that you are waiting till the property is sold and turned into cash, and they are able to distribute it? A. Yes. 595

Q. What do you estimate the value of all your interest in that estate to be? A. It is rather difficult to estimate it.

Q. Haven't you from time to time estimated it? A. Yes.

Q. What estimate did you put on it? A. I suppose it is worth something over $1,000; it varies according to——

Q. What do you say? You said it varies according to—— A. I stopped. 596

Q. You filed some petition in this bankruptcy proceeding setting forth the value of your interest, did you not? A. Not that I know of.

Q. Did the trustees in bankruptcy on your behalf file any such petition? A. Not that I know of.

Q. Didn't you offer to purchase, or did somebody on your behalf offer to purchase the interest in this estate at a given figure? A. One of your— I tried to induce one of your clients to make an offer.

Mr. Larkin: I move to strike out the answer as not responsive. 597

Motion granted.

The question is read to the witness.

A. No.

Q. Was not an offer made on your behalf or by you or anybody that you have ever heard of to purchase this interest in your father's uncle's estate at a given figure? A. I believe the trustees received such an offer.

Q. Do you know who made the offer? A. Some lawyer made the offer.

598 Q. Do you know his name? A. I don't remember his name.

Q. Do you know him personally? A. No.

Q. Did you have anything to do with asking him to make the offer? A. I have never seen him.

Q. (Repeated.) Did you have anything to do with asking him to make the offer? A. No, I didn't ask him, or ask any one to ask him.

Q. Did you know that he was going to make the offer before he made it? A. I didn't know he was going to make the offier or who was to make the offer.

599 Q. Did you know an offer was to be made? A. Probably an offer would be made.

Q. How did you know that? A. Because I know who expected to try and buy it.

Q. Did you talk with any one with reference to having an offer made? A. I have testified that I have had nothing to do with making an offer. (To the Referee.) Is Mr. Larkin entitled to continue to ask these questions?

The Referee: Yes. Did you talk with anybody about making an offer?

The Witness: Yes, I did.

600 Q. Tell us about it? A. I went to Mr. Wallace of the Central Trust Company.

Q. Did he make the offer? A. No.

Q. We were speaking about somebody that made an offer, weren't we? A. Yes.

Q. I ask you to tell us all about that? A. I don't know very much about it.

Q. Whatever you do know, tell us. A. I knew that an offer was to be made by one of my relatives; to be made to buy the interest in the esatte.

Q. For how much? A. I don't remember the price.

Q. Wasn't it $1,750? A. If that is the offer that 601
was made.

Q. But don't you remember that it was that? A. I do not remember.

Q. Did you ever talk it over with your relative as to the amount that should be offered? A. I don't think so.

Q. Is there any doubt about it? A. I don't remember ever having talked it over.

Q. What was the relative's name? A. It was my mother.

Q. Why did you answer me that way, and say it was a relative of yours? A. It was a relative.

Q. It was a near relative; you never talked to 602
her about the amount that was to be offered, did you? A. I don't think so.

Q. Did she tell you that she was going to make this offer before she made it, or did you learn about that from some outside sources? A. I advised her to try and buy it, if she could.

Q. Advised who? A. My mother.

Q. I thought you said you didn't talk with her about it? A. I don't think I literally said I didn't talk with her about it.

Q. I understood that was what you said; you did talk with her about it? A. Yes. 603

Q. You advised her to make that offer? A. I did not advise her on the price.

Q. Why did you advise her to buy it? A. To keep the estate in the family.

Q. Didn't you do it because you thought you could get it cheaper than it was worth? A. No, not particularly; it is always good business to buy cheap if one can; I certainly would not advise my mother to pay more than it was worth.

604 Mr. Larkin: I move to strike out everything after the words "no, not particularly."

Motion granted.

Q. My question is did you advise your mother to buy this property because you believed it was worth a good deal more than the figure of $1,750? A. I advised her to buy it, because I thought it was worth more.

Q. Did you talk more than once about it? A. I think not.

Q. Do you know what action the trustees took in respect to that offer? A. I believe they accepted
605 the offer.

Q. And has the interest in the estate been sold? A. I couldn't say anything further, because I do not know.

Q. But you still continue to receive your income, don't you? A. Yes.

Q. And you believe that the offer has been accepted? A. I believe it was accepted.

By the Referee:

Q. Was this offer for that part of the estate out of which you get your income? A. No.

606

By Mr. Larkin:

Q. What part of the estate was it from? A. For the undivided portion.

Q. Did you ever hear of any other offer being made for that interest? A. No.

Q. Where is this property that is unsold, the selling of which stands between you and immediate distribution to you of your vested interest? A. At 70th Street and 5th Avenue.

Q. Which corner? A. I think it is the southeast corner.

Q. How large a plot is that? A. It is about 25 607
feet wide and about 150 feet deep.

Q. How much is it worth? A. I couldn't tell you.

Q. Have you any idea; did you ever hear anybody tell you what that plot was worth? A. Yes.

Q. What did you hear? A. $350,000.

Q. Is there any mortgage on it? A. Not that I know of.

Q. You would know if there was a mortgage on it, wouldn't you, you follow the affairs of the estate close enough to know that? A. I have only seen one report from the estate, or possibly two 608
since it has been an estate.

Q. If the trustees of that estate received say $350,000 from the sale of that property what is your share of that $350,000, or of that vested interest? A. One-fourth of one-fourteenth, less a widow's interest.

By the Referee:

Q. How old is your mother? A. 60-odd.

By Mr. Larkin:

Q. Is there any other real estate? A. No. 609

Q. That is the only piece? A. All that I know of.

Q. Is there any personal property that is undistributed? A. I have got all I could out of that.

Q. I say is there any personal property that is on hand undistributed? A. Not for my interest, that I know of.

Q. The Trustees' accounts would show? A. I think so; I suppose so.

Q. And you have seen them recently, have you? A. No.

Q. Who are the trustees of that estate? A. Mr. William P. Dixon is the trustee.

610 Q. Did you ever hear of any other offer being made for that interest? A. I said no.

Q. You have no personal debts, other than this one to your mother? A. That is all.

Q. These accounts that you sent to your mother, were they in the usual form of a broker's account? A. Yes.

Q. That you personally sent to her? A. Yes.

Q. Did you keep any copies of them? A. I did have some copies of them; I don't know where they are.

Q. What manner did you employ in keeping the
611 copies of the accounts? Letter press copies? A. Letter press.

Q. Are those books still available? A. I don't remember where the copies are.

Q. Do you know whether your mother preserved any of these accounts? A. I think she has most of the accounts, if not all.

Q. Have you examined them recently? A. No.

Q. Have you ever examined them? A. I did when they were sent to her.

Q. No; but after they got into her possession did you ever examine them? How do you know that she has them? A. She usually keeps any busi-
612 ness papers that she has.

Q. Then you are only speaking about her custom? A. Yes.

Q. You haven't seen them, and haven't asked her about them, and don't know, other than that you think she usually keeps papers of that sort? A. That is all.

RE-REDIRECT-EXAMINATION BY MR. WOLF:

Q. You were asked by Mr. Larkin whether or not the trustees of this estate accepted the offer, and you answered yes; do you mean by that to

say that the trustees had conveyed to the purchaser their interest in the Estate of Mr. Josiah M. Fiske, Sr? A. I understood that the offer had been accepted; but I do not know. 613

Q. Then that is merely hearsay; do you mean you have been told by some third party? A. Yes.

Q. Not by the trustees or their representatives? A. No.

Q. Among the assets that you have set forth in your schedule you have one share of the Morris County Golf Club, par value $100. Is that share worth more than $100? A. I do not think so.

Q. You have in your schedule of assets three bonds of the Egypt Mills Club of Pike County, $100 par value each; are they worth more than par? A. No. 614

Q. You have one 3% loan of 1898 United States of America Government bond, par value $20, all coupons attached from issue; can you tell what the value of that is? A. $27, or something of that sort.

Q. You have three Cedar Lake Park 6% First Mortgage Gold bonds, par value $100; can you state whether those are worth more than $100- A. They are not.

Q. You have 50 shares of Walter Automobile Company of New Jersey, par value $100; is that worth more than $100 a share? A. It is not worth that. 615

Q. How much is it worth, if you know? A. I don't know.

Q. You have one Egypt Mills Club, Pike County, Pennsylvania, share of stock, par value $100; can you state what that is worth; more or less than $100? A. I should say that it would be less.

Q. You have 40 shares of St. Nicholas Skating

616 & Ice Company stock; can you tell what that is worth? A. About $25 a share.

Q. Thirty shares of Globe Mining and Development Company, par value $100? A. It is worth pretty nearly nothing; no value that I know of.

Q. You have 50 shares of Meatox Company, common? A. Worthless.

Q. And 50 shares preferred? A. Worthless.

Q. And 100 shares of Manhattan Transit Company? A. I don't know what that is worth.

Q. Is that a quoted stock? A. Yes.

Q. Do you know what the price was on the 19th
617 of January? A. My impression is that it was about $7 a share.

Q. The values that you are giving now hold good as of the 19th day of January, 1910? A. Yes.

Q. You have one membership in the New York Produce Exchange; what was its value, if you know? A. I don't know.

Q. Hasn't that any value? A. Yes.

Q. Approximately how much? A. $300 to $350.

Q. That was the value on the 19th of January? A. I don't think there was much difference; I think that was what it was sold for, if I remember
618 rightly.

Q. Policy on the gas launch Wee One, Boston Insurance Company, $1,200, one year from July 18, 1909. Can you state what the value of that was on January 19, 1910? A. It was worth the rebate on the premium; very little.

Q. Just a few dollars? A. That is all.

Q. Policy Y 1315, Federal Insurance Company, insurance on auxiliary catboat Myrtle, $2,000, from June 12, 1909, to June 12, 1910; what was that worth on that date? A. The same as the last.

Q. Policy A 3578 (liability) Federal Insurance

Company, on automobile, J. M. Fiske, June 14, 619
1909, to June 14, 1910, $5,000. A. I don't know whether there was any rebate on that or not.

Q. The value was very small? A. Very little.

Q. No. 264,504, United States Branch of the Employees Liability Insurance Corporation, Ltd., Josiah M Fiske, expires June 7, 1910. What was the value of that on January 19, 1910? A. Not much.

Q. Just a few dollars? A. Yes.

Q. Policy 596,379, Insurance Company of North America, $3,000 on furniture of Charlotte M. Fiske, What was its value on that date? A. Pretty nearly 620
nothing.

Q. Policy 6805482, $3,000, Commercial Union Assurance Co., Ltd.; what was the value of that on that date? A. Very little.

Q. Policy 192152, Aetna Life Insurance Company, on life of J. M. Fiske, $600, Caroline W. Fiske, beneficiary. Can you state what the value of that was on January 19, 1910? A. I do not know.

Q. Approximately? A. I couldn't say approximately.

Q. What does the $600 mean? A. That was the 621
face of the policy.

Q. So that upon death $600 would come due? A. Yes.

Q. To Caroline W. Fiske, beneficiary? A. Yes, that is my mother.

Q. Policy 249759, Policy Aetna Life Insurance Company, on life of J. M. Fiske, $2,500; Charlotte M. Fiske, beneficiary. Can you tell what the value of that was on January 19, 1910? A. I don't know.

Q. Approximately? A. I don't know approximately.

622 Q. $2,500 was the amount payable upon death? A. Yes.

Q. And three other policies of the same tenor, you give the same answers? A. Yes.

Q. I think you testified that the two boats that you have mentioned in your schedule, the catboat and the launch, were sold by the Receiver and brought approximately $2,000? A. No; I think they brought approximately $1,400.

RE-RECROSS-EXAMINATION BY MR. LARKIN:

Q. In signing these schedules and tracing the
623 valuations opposite the several items, why did you not place a value on the item 64,429, one 3% loan of 1898 United States of America Gold Bond, par value $20, all coupons attached from issue—why did you not place a value on that? A. The bond is worth its face, plus the coupons.

Q. But you declined to give a value; at least, you put opposite it "value unknown;" why did you do that? A. I think a good many of those items were just listed up.

Q. Now I ask you why did you not place a value on this $20 United States Government Bond, all
624 coupons attached from issue? A. At the time I made that schedule I didn't know how many coupons were on.

Q. That was the only reason you gave "value unknown"? A. As I remember it; I didn't look it up.

Q. You have here an item, "one share of Morris County Golf Club, par value $100"; you don't know what that was worth? A. No, I didn't know, and I don't know to-day.

Q. This item of different numbers of shares of the St. Nicholas Skating & Ice Company; you know the value of that stock, don't you? A. The last sale

I saw it auctioned at the present time was $25; further than that I couldn't tell you. 625

Q. You didn't know the value at that time? A. No.

Q. You knew it was worth something? A. I knew it was worth something.

Q. The Manhattan Transit Company; wasn't that a quoted stock? A. It was a curb stock.

Q. A quoted stock? A. Yes.

Q. Didn't you know the value of that from day to day? A. I might have looked it up; I didn't.

Q. Why did you put the value unknown? A. Isn't that the last item in the list? 626

Q. No; the next to the last. A. There were one or two items that I added on that I located subsequently.

Q. Why did you decline to put that value, and why did you state that the value was unknown when it was a quoted stock? A. I suppose because I didn't look it up.

Q. There is an item here, one membership of the New York Produce Exchange. There are methods of determining the value of that membership from day to day, aren't there? A. They are quoted.

Q. You knew when you declined to give a value on this that they had a regular value which didn't vary very much? A. It varies according to the number of assessments that there are against the policy; but it doesn't vary a great deal. 627

Q. And you knew there was a standard value to that, and that it was ascertainable without very much difficulty? A. Yes, it was ascertainable, but on the other hand the number of assessments for deaths should be deducted.

Q. Even that is ascertainable with very little difficulty. Isn't it a fact that the Counsel for Trustee has been examining you, and I have asked you

628 some questions in respect of all of these items which could have been given values if you had taken the trouble to find them out? A. No.

Q. A great many of them could? A. Some of them could, approximate values.

Q. What do you mean by approximate values? A. The St. Nicholas Skating & Ice Company, for example.

Q. You can come within a point or two of it, can't you? A. No.

Q. Within five points? A. I don't believe so.

Q. Well, you could come within 3? A. Possibly.

629 Q. And what is the nearest you can come to a government bond; how near could you come to that? A. Within a point, easily.

Q. You could come within an eighth of a point, couldn't you? A. No, not within that much.

Q. Within a quarter of a point? A. Not that.

Q. How near could you come? A. Within 1%.

Q. But you could do that? A. I think so.

Q. In the Manhattan Trust Company you could come very closely to estimating the value of that, couldn't you? A. I think likely.

Q. How near could you come to it? A. I think I could have probably guessed within two points,

630 and looked up and found it almost exact.

Q. Found it almost exact; and you didn't keep sufficiently informed of the price of that particular security so that you think if you had guessed you would have probably guessed wrong, two points? A. I might have guessed wrong.

Q. You didn't follow any closer than that? A. I didn't follow any closer than that.

Q. Yet you were the owner of a hundred shares of this stock? A. Yes.

Q. This Cedar Lake Park 6% First Mortgage

gold bond; did that have a variable value? A. 631
A very problematic value.

Q. Have you ever bought and sold that before this? A. No; I bought this, and that was all.

Q. What did you pay for that? A. I don't remember; I think I paid about 70 for one of them.

Q. What did you pay for the other two? A. I don't remember.

Q. Don't you know that the one you paid $70 for was worth $70? A. I suppose so.

Q. In placing the value unknown on it you meant by that that it was worth something above 70, and you didn't know exactly what? A. No, 632
I don't say so.

Q. What did you mean by placing the value unknown? A. You take a practically unknown thing of that character, and it is worth what you can get for it.

Q. And that is what you meant by value unknown? A. I think they sold three of them out the other day for $100 for the lot.

Mr. Larkin: I move to strike out the answer.

Motion granted.

Q. That was what you meant when you put value unknown? A. Yes, I couldn't give the ap- 633
proximate value.

By Mr. Wolf:

Q. Was any portion of this interest that you own in the estate of Josiah M. Fiske acquired by purchase? A. Yes, I bought my cousin's portion; John D. Fiske.

Q. What interest did he have, which you bought? A. I think he had one-third of one-fourteenth.

Q. How much did you pay him for it? A. $1,000.

634 By Mr. Larkin:

Q. One-third of one-fourteenth? A. Yes.

Q. You pursued your usual policy of buying it cheap, did you? A. I tried to, yes.

Q. When did you buy it? A. I think it was about five years ago; Mr. Wolf has the contract for it.

ARTHUR C. SHERWOOD, being duly sworn and examined as a witness for the plaintiff, testified:

By Mr. Wolf:

635 Q. I show you the schedule filed by you individually as bankrupt herein; can you tell what your liabilities were on January 19th, 1910? A. My liabilities were $12,533.91.

Q. That was your individual liability? A. Yes.

Q. Do your schedules in bankruptcy filed by you individually show all your individual assets? A. Yes.

Q. Under the statement of all property of the bankrupt, schedule B-1, real estate owned by you, it appears that you own two lots numbered 96 and 97, containing 16,100 square feet, Rockaway
636 Township, County of Morris, State of New Jersey. Can you tell the value of that or what it was on January 19th, 1910? A. I should say nothing; I paid $100 for that; that is my recollection.

Q. When did you pay $100 for that? A. Two or three years before; I think they have been sold for taxes.

Q. Your personal bank balance January 19th amounts to $362.41; is that correct? A. That is correct.

Q. You owned an automobile which was sold by the Receiver? A. Yes.

Q. For $1,829? A. Yes.

Q. Was that the value of it January 19th, 1910? 637
A. Yes.

Q. You owned some Golden Fruit Company stock; can you state what that was worth on that day? A. Practically nothing.

Q. How about Rockaway Valley Ice Company? A. Absolutely worthless.

Q. Common and preferred? A. Worthless.

Q. Golden Anchor Manufacturing Company; what was that worth? A. That was quoted at one or two cents a share, I think; it may be worthless.

Q. It wasn't worth any more on January 19th, was it? A. No, I don't think so; I couldn't find 638
the quotation.

Q. Mogul Copper Company? A. Worthless, as far as I know.

Q. What was Belcher Mountain Company stock worth January 19th, 1910? A. The same value; worthless.

Q. Consolidated Steamship Company; what was that worth January 19th, 1910? A. That is out of business; that is worthless.

Q. Columbian National Oil & Gas Company stock; what was that worth January 19th, 1910? A. Worthless, as far as I know.

Q. 2,000 Cedar Lake Park bonds; what was that 639
worth? A. I should say approximately $50 apiece.

Q. You had a $1,000 policy in the Equitable Life, $5,000 in the New England Mutual, $10,000 in the North Western Life and $10,000 in the Phoenix. Can you tell what surrender value, approximately, those policies had January 19th, 1910? A. I don't think there was any.

Mr. Wolf: I offer in evidence the schedules in bankruptcy of Arthur C. Sherwood, individually.

They are marked Plaintiff's Exhibit 30 of this date.

[Printed herein at pp. 428-439.]

640 CROSS-EXAMINED BY MR. LARKIN:

Q. In your schedule just introduced in evidence, under the heading, "Schedule A-5, Accommodation Paper," there is an item E. C. Sherwood, Englewood, New Jersey; note, $12,000; who is E. C. Sherwood? A. My mother.

Q. Did she actually loan you $12,000 in cash? A. Yes.

Q. When? A. In May, 1901.

Q. Was that when you were in business? A. Yes.

Q. And you never have paid the note? A. She loaned me more than that; I paid off all except
641 $12,000.

Q. But the note is still outstanding and a valid debt against you? A. Yes.

Q. There is another item of E. C. Sherwood; that is just interest? A. Interest.

Q. Did you go over these schedules carefully? A. Yes.

Q. And they are true, are they? A. Yes.

Q. Are these life insurance policies still in force? A. Yes.

FRANK O. ROE, recalled.

642 By Mr. Wolf:

Q. You testified before Mr. Miller, the Referee in Bankruptcy, on May 13, 1910, at page 25:

> "Q. Now is it a usual thing for you, or was it as cashier of the bank, to go around to customers to whom loans had been made, endeavoring to get them to put up collateral? A. No.
>
> Q. That was an extraordinary occurrence, was it not. A. Yes."

Was that testimony given by you? A. Yes.

Q. And was it true? A. Yes.

CROSS-EXAMINED BY MR. LARKIN: 643

Q. Do you remember giving this testimony at the same time, and before the same Referee:

"Q. Do you recall of any instance where you ever did before? A. Yes."

Do you recall that? A. Yes.

REDIRECT-EXAMINATION BY MR. WOLF:

Q. Did you also give this testimony:

"Q. When was that? A. I don't care to mention the names of the brokers.

Q. How long before was it? A. Two 644
years.

Q. So that the two years elapsing between that time and the Fiske & Company incident, that was the only time that that had happened? A. Yes."

Is that true? A. I have no doubt it is, if it is in the record.

DUDLEY T. HUMPHREY, recalled.

By Mr. Wolf:

Q. On the 19th of January, 1910, can you state 645
what your individual debts were? A. They are in the schedules there.

Q. Can you tell by looking at the schedules what your individual debts were on that day?

Witness refers to schedules.

Mr. Larkin: Why don't you put it all in evidence?

Mr. Wolf: There are some items here that he has got "value unknown."

646 By Mr. Larkin:

Q. I only want to ask you, Mr. Humphrey, whether that is a true statement of your assets and liabilities at that time? A. Yes.

Q. There isn't any question about it? A. No.

Q. And that is all the assets you had? A. That is all the assets I had.

Q. And that is all the liabilities you had? A. Yes.

By Mr. Wolf:

Q. Will you state what your assets and liabilities
647 were, looking at the resume of the schedules? A. The liabilities were $440.41.

Q. And the assets were how much? A. Not exceeding $1,000.

Mr. Wolf: With the exception of proving Mr. Washburn's individual insolvency we rest.

Adjourned till Thursday, March 16th, at 10.30 A. M.

648

NEW YORK, May 11th, 1911. 649

Met pursuant to agreement.

PRESENT:

THE REFEREE.

HAYS, HERSHFIELD & WOLF (MR. BAER).

MR. LARKIN, MR. FREEDMAN and MR. GARRETSON.

HENRY R. CARSE, being duly sworn and examined as a witness for the defendant, testifies as follows:

By Mr. Larkin: 650

Q. What is your occupation? A. Vice-President of the Hanover National Bank.

Q. Of this city? A. Yes.

Q. How long have you been connected with the Hanover Bank? A. Since 1886.

Q. You have been an officer of the bank for how long? A. Since 1901.

Q. Does the Hanover Bank make what are called day or clearance loans to stock brokers? A. Yes.

Q. How long has it been making such loans? A. Since 1897. 651

Q. Will you state generally how such loans are made and the course of business in relation to them?

Plaintiff's Counsel: Objected to as immaterial and irrelevant, not affecting the issues in this case, and incompetent.

Objection overruled.

Exception.

A. The broker, in the morning, figuring up the amount of stocks or securities he has to pay for,

652 or the loans that he has to turn over, makes up a demand note for a round amount, and sends it up to our loan desk with his pass book; we make a loan for the amount, enter it in the pass book, and credit it on the ledger; a memorandum of this amount is made on the certification book, together with the amount of balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account; and against such credits we certify checks that are presented during the course of the day by the broker. When the
653 day's work is cleared up the broker sends up a check to the loan clerk for the same amounts as the notes; we stamp the note "Paid," and return it to him, and the check going through the books as a charge, offsets the credit that was made on the loan in the morning.

Q. Is that process repeated each day?

Same objection ruling and exception.

A. It is repeated each day.

Q. With each Stock Exchange house that you do business with? A. With each Stock Exchange house that we do business with.

654 Q. About how many different Stock Exchange houses do you do business with on the average, every day?

Same objection, ruling and exception.

A. We have about 75 Stock Exchange houses; Stock Exchange accounts; all of them do not ask such accommodation every day.

Q. Does that run up into a good many million dollars every day?

Same objection, ruling and exception.

A. It runs in ordinary times about ten million dollars a day.

Q. How do these clearance loans differ from other loans, other demand loans made by the bank? 655

Plaintiff's Counsel: Same objection, and as calling for this witness's information as to his own bank, and therefore is not proof of any custom, and therefore is immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

A. Do you mean demand loans made to Stock Exchange houses?

Q. Yes. A. The rule is that loans are not made to Stock Exchange houses without collateral. The 656
nature of their business is such that the thing which is paid for with the money which is loaned them is in shape to deliver to the lender, and so the lender requires it in the form of securities as collateral; so that on ordinary loans to run for any length of time they are always secured by collateral. In the case of these loans, as the collateral is in transit—that is to say the broker has to deliver it to some one else to get the money to repay the loan, it has developed a form of trust, and the clear understanding implied between the broker and the bank is that whatever the broker 657
obtains by the proceeds of the loan given to him is held in trust for the account of the bank, and is to be accounted for during that day, it being clearly understood that in no case shall this accommodation run beyond the day on which it is granted. If a broker pays for stocks or bonds, it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply retains possession of them long enough to make delivery and get payment; if the proceeds of the credit are used to pay for loans which are al-

658 ready secured by collateral, the bank expects that collateral to be placed in another loan, which might either be made with them or with some other institution, and the proceeds of that loan would pay for this temporary loan, as we generally call it. These things are known as temporary day loans for the purpose of clearing the broker's business.

Plaintiff's Counsel: I move to strike out the answer on the ground that it is not in answer to the question and is absolutely incompetent, and no proof of any custom; it is testimony of what his
659 understanding is of their agreement with a customer, and of their expectations, hopes, prayers and beliefs.

Motion denied.

Plaintiff's Counsel: I except. It is also incompetent, irrelevant and immaterial.

Q. In the ordinary course of business do you ever actually make a demand upon the broker for the payment of those sums before 3 o'clock, or is the loan paid without any demand?

Same objection, ruling and exception.

660 A. The loan is paid as a matter of course without any demand being made. Sometimes in the rush of business the cashier of a brokerage house might overlook making his deposits and in such case we would call him up on the telephone, and ask him what was the cause of the delay.

Q. You mean if it got along toward 3 o'clock?

Same objection, ruling and exception.

A. Yes, sir, if it got along towards 2 or 3 o'clock.

Q. Do you expect that when a broker is paid for securities he delivers that he will use those proceeds towards making his account good with you? 661

Same objection, ruling and exception.

A. That is the clear understanding between the bank and a broker, as soon as the broker receives a check in payment for securities which have been paid for by the use of this credit he shall deposit those checks with the bank, from time to time, and they are constantly urged to keep sending up their checks, not to wait and hold them until they are all in, but to send them up as soon as they get them in their hands.

Q. What is the ordinary custom of business when the checks are deposited as soon as the deliveries begin to be made? 662

Plaintiff's Counsel: Objected to as immaterial, irrelevant and incompetent; not the proper way to prove custom, and no proper foundation laid for it.

Objection overruled.

Exception.

A. It is the custom and the brokers make many deposits during the course of the day.

Plaintiff's Counsel: I move to strike out on the same grounds of objection to the question. 663

Motion denied.

Exception.

Q. Does it ever happen that brokers who obtain these loans bring in before the close of business specific securities?

Plaintiff's Counsel: Objected to as immaterial, irrelevant and incompetent, and calling for a conclusion, and no proof of custom.

Objection overruled.

Exception.

664 A. The brokers who do business with them and to whom we grant this special accommodation do borrow regular call money from us, arranging their loans on the floor of the Exchange, the same as other brokers, and it is in very rare cases that they bring in collateral which they have not been able to arrange the loans on. The understanding is that they shall pay for these loans with good certified checks, and not by forcing loans on the bank; but there have been cases in times of stress where the broker has not been able to arrange the loans and so he has brought into the bank the securities which were paid for by the credit given to him, 665 and the bank has made him a separate loan on that, and with that loan paid off the temporary loan which had been made in the morning.

Q. This understanding you refer to, is that the ordinary usage and ordinary method of doing business?

Objected to as immaterial, irrelevant and incompetent.

By the Referee:

Q. Do you know anything about the case of any other bank than your own? A. I know that by 666 talking with other bank officers, by conferring and discussing these things, from time to time.

The Referee: He may answer.

Exception.

A. Yes, sir.

By Mr. Larkin:

Q. Do you know generally the extent to which the making of these loans is carried by the banks of New York?

Same objection, ruling and exception.

A. Well, there are about a dozen banks in the neighborhood of Wall Street, and those are the only banks who can do it, because banks further away would not be convenient, and some do more of it than we do, considerably, and some do less; I have never heard any amount, but it must run to rather large sums; I would not be surprised if it amounted to a hundred million dollars a day. 667

Plaintiffs' Counsel: I move to strike that out as immaterial, irrelevant and incompetent.

The Referee: Yes, strike out that part where he says he would not be surprised.

Plaintiffs' Counsel: I except. 668

Q. In connection with your business as a banker, don't you inform yourself in regard to the character and extent of this business, in your relation with other banks and stock exchange houses?

Plaintiffs' Counsel: Same objection, ruling and exception.

A. We do in a general way, but banks do not tell in detail to others the business they do; in fact, it is rather against banking ethics to tell to others transactions which they do for their customers.

Q. The National City Bank is the largest bank in the City that does that kind of business, isn't it? 669

Same objection, ruling and exception.

A. Yes, sir.

Q. What other banks?

Same objection, ruling and exception.

A. The Bank of Commerce, Hanover, Mechanics & Metals, Bank of America, the Manhattan Company, Merchants National Bank of New York, and there are some others.

Q. The Bank of Commerce is one of the very

670 large banks of the City? A. The Bank of Commerce is one of the large banks, one of the largest banks of the City, and has a very large brokerage business.

Plaintiffs' Counsel: I make the same objection.

Same ruling and exception.

Q. In the general conduct of this particular class of business, do you every day arrange for the specific amount to be loaned to a particular stock exchange house, or do they have general lines which it is recognized they are entitled to receive?

671 Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

A. The different houses who do business with us have general lines arranged which we grant to them without any special arrangement; if they should have some extra large business going through their office on any particular day they call us up and explain what that business is; if they should send up an extra large note without calling us up we call them up and ask them for an explanation of
672 what this additional matter is.

Q. Then do they make representations to you before you grant the additional loan?

Same objection, ruling and exception.

A. Yes, they state what the general transaction is, and as a rule they stand ready to explain all their daily transactions; in fact, a few of the smaller ones list on the back of their notes the transactions which they are being covered by the credit.

Plaintiffs' Counsel: I move to strike out the answer as immaterial, irrelevant and incompetent. 673

Motion denied.

Exception.

Q. When a new customer comes in and asks for a loan of this kind is it customary to inquire as to the nature of the clearance which he wishes to make with the proceeds of the loan?

Same objection, ruling and exception.

A. Yes, sir; we have him explain thoroughly what he desires the clearance for, the securities which he is handling and the parties with whom he is dealing. 674

Q. Do you ever object to such securities, to making loans of this kind on the securities thus specified?

Objected to as immaterial, irrelevant and incompetent, and not proof of any custom.

Objection overruled.

Exception.

A. If the securities which a broker intends to clear are not such securities that we would accept as collateral to a regular call loan, we refuse to grant the accommodation for clearing them, the idea there being that the security for our money is the thing which is being paid for by our credit, and we want to have something to make that advance secure. 675

Plaintiffs' Counsel: I move to strike out all the answer as irresponsive and immaterial, irrelevant and incompetent and especially that part which

676 begins "The idea there being," as not proof of any custom or any fact.

Motion denied.

Exception.

Q. Suppose you found one of these stock exchange houses using the proceeds of one of these clearance loans for purposes other than making his clearances, would that influence your conduct in dealing with him in the future?

Objected to as immaterial, irrelevant and incompetent; there is nothing in this case
677 about that.

The Referee: He may answer.

Exception.

A. We would stop the accommodation at once, and if this were discovered before checks had been certified, we would refuse to certify the checks.

Cross-examination by Plaintiff's Counsel:

Q. You say you began this certifying of checks against these call demand loans in 1897? A. Yes, sir.

678 Q. And prior to that it was the habit of your bank, was it not, to simply certify checks for more than the customer had on deposit? A. No, sir; prior to that time we had not had any of the brokers' business.

Q. Your brokerage business began in 1897; prior to that you did not do Wall Street business? A. It re-commenced in 1897.

Q. When was the interval; when did the interval of no Wall Street business occur; how many years or months? A. That was before my time.

Q. While you were at the bank, prior to 1897, the bank did no Wall Street business? A. I could

not say; I went on the loan desk in 1897; these 679
loans have always been handled on our demand loan collateral desk.

Q. You don't know what happened before you went on the loan desk? A. I knew—no, I didn't know what happened before, but I know the thing started then.

Q. Do you know what happened before you used to make demand loans and when you were doing a Wall Street business before 1897? A. I think the Wall Street business stopped after the failure of the Marine Bank, when the law was passed against over-certification.

Q. Prior to that, prior to the stopping of the 680
Wall Street, business, you used to permit your customers to have checks certified for more than there was to their credit? A. I wasn't in the bank at that time; that was '84.

Q. Do you mean to say that the bank did no Wall Street business between 1884 and 1897? A. I believe not.

Q. You have no knowledge of what was being done at that time, between 1884 and 1897? A. No, sir.

Q. When a customer of yours sent in his de- 681
mand loan—demand note, he was credited with the money on his pass book, just the same way as any other demand loan was credited? A. Yes, sir.

Q. Unless you knew that he was drawing checks and having them certified for some purpose which you did not consider he ought to, the checks would go through and be certified and paid? A. Yes, but we made it our business to keep track of them.

Q. The customer could draw against his own moneys which were on deposit in addition to de-

682 mand loan credits, as and how he pleased? A. Yes, sir.

Q. And the moneys were mingled together; there wasn't any separate account kept in your books? A. No, sir.

Q. It was credited to the customer's account, just as any other deposit, or the proceeds of any other discount or any other loan? A. Yes.

Q. There was a difference in the way you treated your customers—75 houses—with reference to these demand loans; there was not a uniform practice? A. I don't understand.

683 Q. You said as to some of your customers, you required them—or they did place on the back of the note a memorandum of how they were going to use the money? A. Some of the small—young fellows starting in business.

Q. They put on the back of their demand notes a memorandum of what they expected to do with the money? A. What they intended to do with the money.

Q. Others did not put any such memorandum on? A. No, the larger houses did not.

Q. That is what I mean by saying the custom was not uniform, the practice was not uniform;

684 it was different as far as different firms were concerned? A. We didn't require them to put it on.

Q. They put it on voluntarily? A. They put it on voluntarily, showing what their intention was.

Q. You expected and the understanding was that these demand loans should be paid in money or certified check before the end of the day? A. Yes, sir.

Q. And the customer had until the end of the day to pay them? A. Yes, sir.

Q. When you say some of these small stock exchange houses voluntarily put on the back of the

note in pencil a memorandum of the transaction, 685
do you mean that you required them or asked them to do it? A. No, sir; but when they started with us and asked this accommodation they were small, did not have much means; from the reports we had they were honorable young men, and we were assisting them, so that we would ask them what they were doing in order to see that they were keeping in the right channels, and in order to save coming up to explain the thing, they would write on the back of the note.

Q. They would say "We are going to take up a loan with another loan" or something of that sort? 686
A. Yes, or give the bonds and stocks.

Q. Specify the securities? A. Yes, sir.

Q. That they were going to take up with the money? A. Yes.

Q. That was in some of the cases? A. Some small cases.

Q. You say very rarely have any securities come to you, that these transactions in almost every case were paid by money or certified check, that is right, is it? A. That is right.

Q. And in one or two cases in times of panic or stress a customer has brought—has stated he was unable to raise money on some securities 687
which he had? A. Yes, sir.

Q. Whether it was on securities which he took up with the money he borrowed from you, or whether it was other securities you didn't know, and then you made him a loan on those securities? A. We did know because we checked up the stuff with the checks which we had certified.

Q. As near as you could you found out? A. We can find out very closely.

Q. He would bring those securities to you in those exceptional cases voluntarily and you would

688 make him a time loan or call loan on those securities as collateral? A. A call loan.

Q. That would be credited to his account? A. Yes.

Q. Then he would draw his check against the account to your order? A. Yes.

Q. And pay the day loan in money or check? A. Yes, sir.

Q. So that in every case the loan was paid in money? A. Yes, sir.

Q. And you don't know of a case where the securities were turned in for which the loan was
689 supposed to be made, to you, as security for a loan? A. There was one case.

Q. In all your experience where you did not make a new loan? A. Well, we took the securities and made a loan.

Q. I mean there is only one case where you did that; is that right, where you took the securities and made a new call loan? A. That is all I can recall.

Q. There is no case of which you have knowledge where the securities were brought in for which the loan was supposed to be made and those securities simply kept as security, as collateral for a demand
690 loan, a clearance loan? A. No, we made a new loan on those securities and the proceeds of the new loan were used to pay that.

Q. To pay the clearance loan? A. Yes, sir.

Q. And of course you would make a new loan on any securities that were good, whether they were the result of the transactions with this day clearance money or not? A. Yes, if we had the funds.

Q. Have you ever heard of the First National Bank? A. Oh, yes.

Q. A very large Wall Street Bank? A. Very large.

Q. You have not mentioned that as one of the 691
banks of which you have knowledge; you don't know how they do business? A. I do not know, but my idea has been that they have not very many Wall Street accounts; only a number of the rather large ones.

Q. Do you know how they treat their customers? A. I do not.

Q. You don't know whether they have the same business in demand clearance loans as you? A. I do not.

Q. Or do it in the same way? A. No, sir.

Q. Have you ever seen the demand notes that 692
are used by the various banks for this day clearance business? A. I have seen a number of them; I couldn't say I had seen all of them.

Q. Have you got one of your own forms with you?

Witness produces papers.

Mr. Larkin: You have also produced a loan agreement?

The Witness: They go together.

Plaintiff's Counsel: I ask to have these marked for identification.

The papers are marked Exhibits A and B 693
for Identification, respectively, of May 11th, 1911.

REDIRECT-EXAMINATION BY MR. LARKIN:

Q. In your observation do you find that different banks have different forms of these demand loan agreements in connection with the clearance loans? A. Yes, they do seem to be worded a little differently; I don't think there is any great difference in their idea.

694 Plaintiff's Counsel: I object to this witness passing upon—

The Referee: Strike out the last part, that there isn't much difference in the idea.

Q. So far as your observation and experience extends do all the various banks that you have mentioned conduct this business in substantially the same way, by making loans in the morning which are paid off before the end of the day?

Plaintiff's Counsel: Objected to as immaterial, irrelevant and incompetent.

695 Objection overruled.

Exception.

A. I believe they do now.

Q. You referred to the fact that these loans must be paid off before the end of the day; what do you mean by that expression "end of the day?" A. Three o'clock we consider the end of the Wall Street day.

Q. The Stock Exchange closes at that hour? A. Yes, sir. As a matter of fact most of them are paid off much earlier than that.

Q. In your experience do you find that the 696 checks begin to come in soon after the brokers commence to make and receive deliveries?

Same objection, ruling and exception.

A. Yes, they commence to come in shortly after ten o'clock and many of these loans are paid off at 11 or 12 or 1 o'clock, according to the amount of business.

Q. You spoke of the fact that you made special inquiries in regard to the small brokers with whom you commenced to do business; does that continue until there has been a sufficient course of business between you and the brokers to establish your re-

lations so that you feel it is unnecessary to make 697
inquiries every day?

Plaintiff's Counsel: Objected to as immaterial, irrelevant and incompetent and not proof of usage or custom, and as leading.

The Referee: He may answer.

Exception.

A. Yes, sir; when the broker has by the conduct of his business established a substantial credit we cease to ask these questions in regard to ordinary amounts.

Q. If there is an extraordinary amount you 698
make inquiry as you have already testified? A. Yes, sir.

Recross-Examination by Plaintiff's Counsel:

Q. When brokers make deposits to whom you have made these demand clearance loans, these deposits are not labeled in any way? A. No, sir.

Q. You can't tell except by inference or guess whether these checks are received to carry out transactions for which the broker has borrowed the clearance loan money, or not, isn't that so? A. Yes, sir.

699

Q. And the money as it comes in is of course simply credited to the depositors' accounts? A. Yes, sir.

Q. And the loan is not paid until the broker draws a check for it? A. And if it should happen he did not draw a check we would charge his account.

Q. You would charge his account with the note? A. Yes.

Q. But what is usually done is, he draws his check for the loan at the end of the day? A. Yes, sir.

700 Q. Do you make him pay interest? A. No, sir.

Q. No interest at all on these loans? A. I am sorry to say no.

Q. You don't care where he gets the money from to pay the loan as long as he gets it; it doesn't make and difference to you whether it comes from the particular transaction which you expect or hope he has borrowed the money for, or whether it comes from other transactions? A. No, sir.

By Mr. Larkin:

Q. You can tell that a deposit pertains to the
701 securities collateral to this loan from an investigation of your books if your books show a certification in favor of the broker, and a deposit is received from the broker in the same amount?

Plaintiff's Counsel: Objected to as calling for the contents of books not in evidence and as immaterial, irrelevant and incompetent.

The Referee: The proper way would be to ask if he can tell.

Exception.

Q. Can you tell? A. I don't think so.

Adjourned to Thursday, May 18th, 1911, at 3
702 P. M.

NEW YORK, May 25th, 1911.

Met pursuant to agreement.

PRESENT:

The Referee;

Mr Wolf;

Mr. Larkin.

Plaintiff's Counsel: I offer in evidence note and agreement which were produced at the last hearing

and marked for identification. I understood this 703
note and this agreement were the only note and only agreement they used with reference to these transactions which he testified about.

Mr. Larkin: My understanding was they had different forms at different times; he may have said this was the only form now in use.

The papers marked A and B for Identification at the last hearing are marked in evidence Plaintiff's Exhibits 30[A] and 31 respectively of May 25th, 1911.

[Printed herein at pp. 440 and 440-443.]

704

JAMES S. ALEXANDER being duly sworn and examined as a witness for the defendant, testifies as follows:

By Mr. Larkin:

Q. What is your occupation? A. Vice-president of the National Bank of Commerce.

Q. How long have you occupied that office? A. Four years.

Q. Prior to that time were you connected with the Bank of Commerce? A. Yes, with the exception of a period of nine months, I have been with 705
the Bank of Commerce since 1885.

Q. The Bank of Commerce is one of the very large banks in New York City, is it not? A. Yes, supposed to be.

Q. About what are its average deposits? A. At the present time about $140,000,000 net.

Q. Does the Bank of Commerce make what are known as day or clearance loans to stock brokerage houses? A. Yes.

Q. Are you familiar with that class of business? A. I am.

Q. How long have you been familiar with that

706 business? A. I have been in charge, or was in charge of that branch of the business for several years, during all the period of my holding office as vice-president, and previous to that too, more or less.

Q. Will you state generally how such loans are made and the manner in which that branch of the business is transacted?

Plaintiff's Counsel: Objected to as immaterial, irrelevant and incompetent.

Objection overruled.

Exception.

707 A. The accommodation is granted for the purpose of enabling brokers to accept loans and receive securities, and they send a note in the morning of the day on which these transactions are to take place, which note is credited to their account for the purpose of——

Q. Is that a demand note? A. A demand note always; they first draw their checks against the amount of the credit, and use those checks for the purpose of acquiring securities, either in payment of bonds or stocks bought, or in payment of loans,

708 and when these securities are delivered to others, or loans placed elsewhere, the resultant funds are deposited with us, and at the close of that day a check is given to take up the demand loan.

Plaintiff's Counsel: I move to strike out the answer and each and every part of it on the ground the witness is testifying as to facts not within his knowledge, but as to facts he assumes to be true; and it is hearsay testimony, and immaterial, irrelevant and incompetent.

Motion denied.

Exception.

Q. Is that true of each loan you make to each customer? 709

Same objection, ruling and exception.

A. The same rule applies to each transaction.

Same motion, ruling and exception.

Q. Is a new loan made each day?

Same objection, ruling and exception.

A. Each day; yes, sir.

Same motion, ruling and exception.

Q. And that loan is paid off before the close of business each day? 710

Same objection, ruling and exception.

A. Yes.

Same motion, ruling and exception.

Q. Without any formal demand by the bank for its payment?

Same objection, ruling and exception.

A. Yes; and I might state if through oversight the loan is not paid, there is a clause in the note which makes it payable to the bank, and is immediately charged to the account of the maker under 711 that clause, so these notes are limited in one way or other to over-night accommodation, either by taking them up by check—which simply puts them back into the possession of the maker—or by charge to the account; the holding of the note is a voucher.

Same motion, ruling and exception.

Q. Do you have any recognized lines in the case of different stock exchange houses as to the amount which they are entitled to, without specific inquiry?

Same objection, ruling and exception.

712 A. Based on their average daily requirements, and then it is customary for them to confer with us if they want larger amounts.

Same motion, ruling and exception.

Q. Do you in such cases where they run over the average amounts ask for any explanation as to why they require additional loans?

Same objection, ruling and exception.

A. Usually that is the ordinary thing, requiring them to call up; but a firm might be of such high standing and such large financial resources we
713 might not care to go into the details. With other firms we would ask if possible what securities they were going to receive and to whom they were to be delivered, the object being of course, to know that such securities are what we would care to make an over-night loan against.

Same motion, ruling and exception.

Q. Suppose a new stock exchange house should apply to you for accommodation over night, would you make inquiry as to what they expected to do with it?

Same objection, ruling and exception.

714 A. When we took on the new account, we would go very thoroughly into the whole question, and inquire as to the membership of the firm and amount of capital in the business, and the character of the business they proposed to do, whether commission business or standard securities, etc.

Same motion, ruling and exception.

Q. You would want to know the character of securities in which they dealt?

Same objection, ruling and exception.

A. Yes, that is the vital thing, because we are making the advance to put them in possession of these very stocks; if they couldn't deliver, they might have to come back and deposit the securities with us; it might be a forced over-night loan and we would want to know whether they were such collateral we would loan on. We would not know the securities they had acquired were securities we would be willing to loan on. 715

Same motion, ruling and exception.

Q. In other words, if it were a forced loan you would insist on having such securities as you would have for a loan secured by collateral in the ordinary course? 716

Same objection, ruling and exception.

A. Exactly; we are looking to the collateral back of these day clearance notes to the same extent that we are looking to the collateral back of our overnight loans; the basis in the bank is exactly similar.

Same motion, ruling and exception.

Q. Exactly similar to what; to the overnight loans? 717

Same objection, ruling and exception.

A. Exactly.

Same motion, ruling and exception.

By the Referee:

Q. You look to their securities as your security? A. Yes; in one case we have the securities in possession and the other case we have not.

718 By Mr. Larkin:

Q. In either case you depend on the good faith of the brokers?

Same objection, ruling and exception.

A. That is right, yes, sir, to turn them over to us or the avails of them.

Same motion, ruling and exception.

Q. That is, you permit the broker to take——

Plaintiff's Counsel: I don't think you ought to lead about this; let him testify to what he does.

719 A. If you want to know how they clear the loans I will tell you. Here is a concern has a loan with the First National Bank of $100,000 and the First National Bank calls the loan; they bring their note to us for $100,000 and we credit their account; we certify their check to the order of the First National Bank for $100,000 and interest on the loan whatever it may be; they take this check to the First National Bank and receive back their note and collateral, which is the value of $120,000 and such collateral as the First National Bank would be willing to loan against; they seek in the market for another place to place that loan and
720 they may put it with the Manhattan Company and deposit it with a new note, and get the check of the Manhattan Company and deposit it with us.

Same motion, ruling and exception.

By the Referee:

Q. If they don't do that what becomes of the securities? A. If they couldn't find anybody else to loan on the securities they would have to bring them to us and we would have them as collateral to a temporary advance which we make. On some of these securities perhaps the loan may not have

been called; they may have sold a good many se- 721
curities out of these and rather than—they might make a new loan of $50,000, an additional $50,000 of collateral, for sales previously made, and we would look to receive the new loan check for $50,000 and the avails of the other $50,000 of securities sold.

By Mr. Larkin:

Q. Suppose you discovered the Stock Exchange house to whom you had made such a loan had used the proceeds for some other purpose, what would you do? 722

Plaintiff's Counsel: Same objection, and on the further ground it is purely speculative.

Objection sustained.

Q. How many different stock brokers do you have such accounts with? A. About 100.

Same objection and motion and same ruling and exception.

Q. Can you state about what is the extent of these loans on a daily average?

Same objection, ruling and exception.

A. It depends largely on the activity of the se- 723
curities market.

Q. Take it from one year to another?

Same objection, ruling and exception.

A. From around fifteen million dollars a day and upwards; I suppose the average would be higher than that.

Same motion, ruling and exception.

724 By the Referee:

Q. How many banks in the City do this business? A. I can't answer that.

Q. Can you approximate it; I suppose the proximity of the banks to Wall Street has something to do with it? A. Yes, sir, that is an important element; the City Bank, the Hanover, the Mechanics & Metals, the Manhattan Company, the Merchants do some; I presume there are a number that do.

By Mr. Larkin:

725 Q. The Bank of New York? A. Yes.

Q. And Seaboard? A. Yes.

Q. Did you mention the Bank of America? A. The Bank of America does some of that business.

Q. Why do you say proximity to Wall Street is essential?

Same objection, ruling and exception.

A. Well, a very small bank would scarcely go into that class of business, and on the other hand, when transactions are heavy I think that it would be impossible to make the deposits and have checks certified promptly, and to carry out the routine
726 that goes with that business.

Same motion, ruling and exception.

Q. The transfer of securities from one place to another, it all has to be done in some short space of time?

Same objection, ruling and exception.

A. We couldn't go way uptown; if a broker gave checks on an uptown bank it would force him out of business; they couldn't send them up there to have them certified.

Same motion, ruling and exception.

Q. It would be more difficult to make transfer of securities from one bank to another if they were separated? 727

Same objection, ruling and exception.

A. Yes, I presume some of the smaller uptown banks carry demand loans downtown, but they have collateral for them with the downtown banks; that is the custom of the downtown banks that follow that feature of the business; otherwise they couldn't get the brokers' accounts; the brokers wouldn't keep them with them.

Same motion, ruling and exception.

728

Q. The banking hours in New York are from 10 to 3? A. Yes.

Q. That is the time the Stock Exchange opens? A. Yes.

Q. At what hour in the morning are day clearance loans usually made?

Same objection, ruling and exception.

A. They send them up about half-past ten; sometimes even later; a loan might be called in the middle of the day when the broker had not expected it, and he might have to send up the loan for that purpose in the middle of the day. 729

Same motion, ruling and exception.

Q. Ordinarily.

Same objection, ruling and exception.

A. Early in the morning.

Same motion, ruling and exception.

Q. How soon do the deposits begin to be made by the borrower?

Same objection, ruling and exception.

730 A. We try to have them made as quick as possible; sometimes a broker would rather keep them on his desk than keep them in the bank; we have to tell them more or less constantly to hurry up their checks; they make them all through the day.

Same motion, ruling and exception.

Q. Do you have some supervision of the deposit to see whether they are coming in?

Same objection, ruling and exception.

A. Yes; the certification clerk keeps the run of every account, every certification account all
731 through the day; he knows exactly how they stand.

Same motion, ruling and exception.

Q. Do you know whether the different banks you have referred to who are engaged in this particular class of business have different forms of obligation which are used?

Same objection, ruling and exception.

A. I can't answer that question from knowledge of the forms they use; I don't think they have uniform forms; I believe all of them have some form.

Same motion, ruling and exception.

732 Q. So far as you know the method of conducting the business is the same in the different institutions?

Same objection, ruling and exception.

A. There is a form employed of conducting the business, and these forms of notes are probably all drawn with the idea of setting forth more or less the conditions of the business.

Plaintiff's Counsel: I move to strike out what is probably done.

The Referee: Strike it out.

Q. So far as your observation extends, do you know any bank where these clearance loans are made, where they are not paid off the same day, no matter what the form of the written obligation may be? 733

Plaintiff's Counsel: Objected to because the witness is not shown to have any knowledge on the subject.

The Referee: You better ask him whether he knows the custom.

A. I know there is just one way of doing the business, and I know why the business is done, because it cannot be done without those temporary accommodations, and that is the reason the business exists; if the brokerage business could be conducted without it there would not be this certification. 734

Plaintiff's Counsel: I move to strike the answer out as immaterial, irrelevant and incompetent.

The Referee: It is only a matter of opinion; I will strike it out. Any fact the witness knows about the usage of the bank he may state.

Q. You say you have been in the banking business for about quarter of a century and you are brought into frequent contact with other bankers in connection with the business? 735

Same objection, ruling and exception.

A. Yes.

Q. You are familiar generally with the manner in which the banking business is conducted by different banks?

Same objection, ruling and exception.

A. Yes.

Q. You frequently confer with other banks and

736 bankers in regard to banking business and business conditions?

Same objection, ruling and exception.

A. Yes.

Q. Don't you know as the result of your experience and of this familiarity with the banking business and the constant contact in which you come with other bankers, the general method employed by the different banks in making these clearance loans?

Plaintiff's Counsel: I have no objection to his
737 being asked if he knows, but not the result of anything.

The Referee: If he knows how the business is done by other banks he may state. They all make these day loans and the agreement is that they are to be paid off during or at the close of the day; the method by which they arrive at that result is a matter of detail of each bank, I suppose.

Mr. Larkin: We don't have any daily note; we have an agreement which is a lasting agreement, and a formal written request to loan, which is in the place of this.

738 The Referee: You can put it in operation during the day, I suppose.

Mr. Larkin: If Mr. Wolf will stipulate that this testimony shall apply to these methods I won't have to call any witnesses; our agreement is in evidence.

Mr. Wolf: So is the request to loan. That raises the question of the method under which this bank did business.

Mr. Larkin: If you don't want to stipulate it will necessitate calling witnesses.

Mr. Wolf: This witness has testified, as I understand, that there are different forms in each bank, and we have the particular form which our bank uses. 739

Mr. Larkin: If you will stipulate that witnesses may be called and if interrogated will give similar testimony to this witness on the subject of the method employed by the Mechanics and Metals Bank, that will be all I want.

Mr. Wolf: I haven't any objection to stipulating anything that will facilitate this, and I am willing to stipulate that the witnesses, if called, will testify that the business is done under different forms; there is no uniformity of forms or method, and the method adopted by the Mechanics and Metals Bank is in evidence. 740

Mr. Larkin: I don't want such a stipulation; we will have to call witnesses.

The Referee: There can't be many different ways of doing this business; there may be a note, a demand note in one bank which may be different in its phraseology from the demand note of another bank, but the primary thing seems to me the loan is made every morning under an agreement by which it is to be paid off during or at the close of the day upon which it is made. 741

Mr. Wolf: We agree to that.

The Referee: The result is evidenced in some banks by a demand note and others by a written agreement with a request such as this in the Mechanics and Metals Bank.

Mr. Larkin: Do you agree to that?

Mr. Wolf: Yes.

742 CROSS-EXAMINATION BY PLAINTIFF'S COUNSEL:

Q. You don't know anything about the way any other bank conducts its business; you are only familiar with your own methods? A. You mean from experience?

Q. From knowledge? A. From actual operation?

Q. Yes. A. Of the interior of the various other banks?

Q. Yes. A. My actual experience in the interior has been with the Bank of Commerce alone.

Q. Do you know, for instance, that in some one or more of the banks the form of note which is taken
743 specifies certain securities which the maker of the note agrees to hold for the loan? A. No, I don't know that.

Q. Haven't you ever seen a promissory note, the form of note used in this business by the First National Bank? A. No, sir.

Q. You know of the First National Bank? A. I have heard of it.

Q. A very large bank in Wall Street? A. Do you want me to answer that?

Q. Yes. A. I know I have heard of the First National Bank; as far as its size and so forth are concerned, do you want me to quote figures?

744 Q. Yes, is it a big bank? A. Yes.

Q. Its deposits are in the millions? A. Yes.

Q. It is not quite as large as the National Bank of Commerce, but almost? A. It depends on how you look at figures; it is not as large as the Bank of Commerce.

Q. Is it nearly as large? A. Several millions less.

Q. It is an old established bank? A. It is; yes, sir.

Q. Now, your bank makes loans on demand notes, that is, loans payable on demand, where the secur-

ities are deposited with the bank, doesn't it? A. It does. 745

Q. And those loans are callable at any time the bank desires the money? A. Yes.

Q. And the specific securities are pledged with the bank and in its actual possession to secure those loans? A. Of course, they are overnight loans; you are not supposed to call them the day you make the loan.

Q. You can legally? A. I don't know about that.

Q. The loans you have been speaking about as day or clearance loans, have you got the form of note which your bank uses? A. No, sir. 746

Q. Have you any agreement which you exact from your customers for them? A. We use only the note.

Q. Have you read the note brought by Mr. Carse of the Hanover Bank? A. No, sir.

Q. (Handing witness paper.) Will you look at it and tell me if your bank has a note in the same or different form; I refer to Exhibit A? A. Our form is a little different.

Q. Can you tell me in what way it differs? A. Well, it is amplified; there is more in it; this embodies, I think, the essential features.

Q. Will you be kind enough to send to the Referee a copy of your note, or will you send me one? 747
A. I have no objection; I don't know whether anybody else has or not.

Q. The way this business is done by your customers is to simply send in a printed note signed by them, with the amount which they want; is that the beginning of the business? A. Yes.

Q. And then, if the customer is a good one, or old one, and that is the amount to which you know he is entitled, you simply credit his account with that amount of money? A. Well, I wouldn't say

748 that; I wouldn't say at the beginning of the business I understand——

Q. At the beginning of the day's business? A. Of course, we have an understanding with these people.

Q. I don't want the understanding; after a note comes in from one of your regular customers in the morning for several hundred thousand dollars, we will say, you credit his account in your books with that sum? A. Yes.

Q. And that is added to whatever sum may be credited to his ordinary account and carried over from the day before or as a balance at that time?

749 A. Yes, sir.

Q. And the moneys, so far as your certification clerk or your other clerks or cashiers are concerned, that money is available to the customer by his simply drawing a check against it? A. Well, now, for certification or for withdrawal of cash?

Q. For certification, we will say? A. Not for withdrawal of cash?

Q. For certification? A. Yes.

Q. Suppose a man draws a check for a thousand dollars and asks to have it cashed, would you refuse it? A. If it was drawn against the amount credited in that day clearance loan.

750 Q. Suppose a man had $25,000 balance and you gave him a credit for $300,000, and he drew a check for $26,000 and asked to have it cashed, would you refuse it? A. You are asking what I would do in a supposititious case; yes, I should, on general principles.

Q. You would refuse it? A. Yes, or hold it up until he made some satisfactory explanation.

Q. Suppose he said he wanted the money to buy stocks with? A. We don't do business that way.

Q. He would have to say what in order to satisfy

you? A. Yes, I might require him to make a de- 751
posit.

Q. You might require it? A. Yes.

Q. Would there be any case where you would permit him to draw that check? A. I would not permit any man to draw cash against a credit of a certification note.

Q. He could draw a certified check for $26,000 without any trouble and have it cashed? A. Yes.

Q. And he could draw the whole $300,000 in the ordinary way as long as he drew it by certified checks, or ordinary checks deposited in some other bank? A. Yes. 752

Q. He would not have to specify what purpose he wanted the cash for at all? A. No, sir.

Q. Do you ask him each day, "What securities are you going to buy with this money?" A. No.

Q. Do you ask what loans he is going to pay off? A. No.

Q. You haven't any knowledge or information on the subject at all? A. No, sir.

Q. And that is the way you do business? A. That is the way we do business.

Q. That is the custom of the business? A. Yes.

Q. You hope and expect and believe that before the day is over he will pay back by certified checks 753
being deposited in your bank the amount of the day or clearance loan? A. No, I won't say that.

Q. In some cases you said that you permitted your customers, according to their financial means and their standing, to increase the amount which you had fixed they could get as a day or clearance loan, without any other explanation or question; that is, simply because of their financial standing? A. The fixing of the line is not a very important thing except to give some working basis; that is all.

754 Q. I mean, you draw a distinction; I want to ask if that is what you mean, that there are some people who could ask for a much larger sum one day, or sum beyond what you had fixed as the line, without having to explain, but that others would have to explain? A. Yes.

Q. Is that right? A. Others might have to explain, and we would ask an explanation in certain conditions of the stock market, and at other times we would not.

Q. Haven't you any rule about the whole thing at all, as to that? A. It is not a cut and dried busi-
755 ness.

Q. It depends on the condition of affairs? A. Yes.

The Referee: The rule is, I suppose, the broker has to do what the bank wants.

Q. You make loans, demand loans, where you have the securities over night? A. Yes, sir.

Q. That is, they are supposed to pay them up over night? A. Yes.

Q. Has there been any case in your experience where the loan was not paid during the day? A. Just one case that I can recall, yes, sir.

756 Q. How long ago was it? A. Three or four years ago.

Q. In that case the man couldn't pay; did he pay the next day? A. That was a mistake on his part and he locked up his securities, and through some error in his delivery sheet we thought his account was covered, and it wasn't.

Q. He locked up his securities? A. He locked up his securities in his vault.

Q. And the next day he paid it? A. I got a trust receipt that night for the securities he had in the vault; then I made him a regular loan against

the particular trust receipt, and cleaned up that day loan. 757

Q. When by three o'clock he had not paid——? A. I don't remember the hour.

Q. Was it after banking hours? A. I don't know what time the banking hours were; a man doesn't always get his deposits in the bank before three o'clock.

Q. Was it after three o'clock? A. Yes.

Q. Was it after four o'clock? A. I wouldn't undertake to answer because I don't recollect the hour; when I say I can't remember that ought to suffice.

758

Q. In this particular case you say a man had not made his loan good by three o'clock and he had locked the securities in his vault; do you mean by that that he had a time lock on his vault and he could not get at them until the next day?

A. I didn't say anything about a time lock; I didn't examine into that.

Q. What, didn't you get the securities themselves? A. Probably he had them in the safe deposit box.

Q. Couldn't he get them in the safe deposit box? A. He said he couldn't.

Q. He gave you a trust receipt? A. Yes. 759

Q. Specifying certain securities? A. Yes, sir.

Q. And the next day did he give you a check? A. Sent us the securities, if I remember rightly.

Q. Did you make him a loan? A. I made him an overnight loan with interest; day loans do not carry interest and I wanted to get the one day's interest.

Q. When you found he had not paid by three o'clock, you called him up or communicated with him and got him to execute a promissory note in the form that you use for call loans with securi-

760 ties pledged with the bank; is that right? A. I didn't say so; we don't use a form for demand loans; we make them under agreement.

Q. Take it in this particular case? A. We made him an overnight loan.

Q. Where the securities are supposed to be in the possession of the bank? A. Yes.

Q. As you could not get the securities because he had locked them up in the safe deposit vault, you got a trust certificate? A. Yes.

Q. Or trust receipt? A. Yes.

Q. Which was a paper in which he stated he held them in trust for you? A. Yes.

761 Q. You were not willing to let him keep those securities under the day loan; you didn't consider it safe? A. A day loan doesn't draw interest, and I wanted to put it through the loan department and get that one day's interest, on general principles; it wasn't because I didn't feel safe; I didn't feel unsafe that I remember.

Q. You wanted it in that form on general principles; is that the only case you know of in your 25 years' experience? A. That is the only case I have any recollection of.

Q. When did you begin doing this business of
762 making these day clearance loans; what year? A. I can't answer that question.

Q. Were you in the bank before the law was changed when you used to allow the brokers to have their checks overcertified? A. Yes, I was a clerk in the bank when the term "certified" was changed to "accepted" in order to avoid the matter of over certification.

Q. You used to permit a broker to have his checks over accepted for a long time? A. Yes.

Q. They used to stamp on the check "Accepted" with the date payable through the Clearing House,

with the signature of the cashier? A. Signature 763
of the teller.

Q. That went on for some time until you were advised that that was illegal? A. Yes.

Q. And then this method of making these day clearance loans was devised to take the place of the over-acceptance of checks? A. Yes, that is right.

Q. It was simply a continuation of the practice in another form? A. That is right.

Q. There was no separate account kept in your books, was there, with each of your customers who did this business, by which they were credited 764
separately in a separate account with day clearance loans? A. Do you mean two accounts for every customer?

Q. Yes. A. No.

Q. All his deposits, whatever they were or from whatever source, were credited to the same account? A. Yes.

Q. You expect as I understand you, that the deposits made by a broker who gets a day loan, will come in during the day, at the beginning, at the opening of the bank at 10 o'clock for banking business? A. The deposits?

Q. Yes. A. I don't expect them as early as 765
that.

Q. At 11 o'clock? A. Well, I wouldn't worry about it if they were not received until later.

Q. I thought you said on direct examination if the deposits didn't come in you used to call up the customers? A. Yes, that is true, but that doesn't mean necessarily early in the morning; in the first place, we don't certify until 10 o'clock; a man receives securities and delivers them elsewhere and checks up the loan, and waits until 11

766 o'clock and he borrows money, and you scarcely except any deposits before 12 o'clock.

Q. If they didn't come in before 12 o'clock you would begin to call up? A. I don't think so; there isn't any fixed rule in regard to that.

Q. Isn't it a fact if they don't make deposits right along after half past eleven or twelve you call them up and insist on their doing so? A. If we think a firm unduly delays sending up their deposits we call them up and ask them to hurry them along; we don't want all our business to come in at the close of business and keep our men
767 there all night to work it up.

Q. What do you call undue delay? A. I am as much at sea about that as the Supreme Court is as to unreasonable restraint; I can't fix the hour; it depends on circumstances.

Q. It doesn't make any difference to you or your bank where a man gets money from to pay a demand loan, as long as he pays it? A. I am not so sure; it depends very largely on whether he continued to hold the securities that he took up with our money in trust for us until he could pay off the loan.

Q. Suppose your customer deposits checks, you
768 don't care whose checks they are as long as they are certified checks and are good? A. I don't care whose checks they are?

Q. No, if they are certified? A. I care if a broker fails to hold in trust the securities or the avails of them for the payment of that loan.

Plaintiffs' Counsel: I move to strike out the answer as not responsive.

Motion denied.

Exception.

Q. If no deposits come in before 12 o'clock from a customer to whom you have made a demand clearance loan, would you call that undue delay in making deposits? A. No, I wouldn't. 769

REDIRECT-EXAMINATION BY MR. LARKIN:

Q. As to what would be undue delay would you take into consideration the firm to which you had made a loan and your previous dealings, and everything of that sort? A. Yes, there are any number of matters to be taken into consideration; for instance, on an active day where a great many transactions take place you naturally expect deposits would come in much later than if a firm wanted to certify their check for a million dollars to take up a million dollars of New York City bonds which they had purchased, for which they had already arranged the loan, you would expect deposits to come in pretty soon; there are many things that enter into it; the matter of following those things up is left in the hands of the certification clerk and he is expected to take all these things into consideration and act accordingly; I wouldn't undertake to fix the hour; some deposits don't get in until four o'clock in the afternoon. 770

Q. On a very active day? A. Yes. 771

Q. Does the certification clerk have general oversight of the checks which are certified against these particular loans? A. He certifies them himself; he does the certification.

Q. How are those checks usually drawn; are they drawn to the order of brokers or bankers as a general thing? A. To the order of the payees; yes, sir, to the order of the banks or brokerage houses or trust companies.

Q. That is some indication of the use to which the checks are to be applied? A. Yes, sir.

772 Q. Would it cause any remark by an officer of the bank to have a check for a large amount presented by a broker who had obtained such a loan, that was drawn to some one out of town?

Mr. Wolf: Objected to as immaterial, irrelevant and incompetent.

Objection sustained.

Q. You spoke of one instance in your experience where a clearance loan had not been paid off before the close of business hours; I understood you to say that was the only instance you recall? A. Of
773 course I didn't have in mind that you might possibly want to know whether we have found it necessary to charge a demand note up against the account through oversight of the maker not sending up a check; such occurrences as that happen occasionally; it is the routine——

Q. But with that exception all of these loans made to all of these brokers for varying amounts every day of the year have been, so far as your experience goes, paid off before the close of business? A. With that one exception.

Q. Has the bank had different forms of obligation at different times? A. Yes, we have.

774 Q. The method of doing this business by your bank, prior to the adoption of any written instrument was similar, was it, to that which now prevails? A. Yes.

Q. That is, where there were over certifications they would be made good before the close of business? A. Yes.

Q. And that was also the case as to over acceptances? A. Yes.

Q. Does your bank make loans to Stock Exchange houses without security? A. We either have security in our possesion or understand that

security is held in trust for us under the terms of the clearance loan. 775

Mr. Wolf: I move to strike out as not in answer to the question, and as immaterial, irrelevant and incompetent.

Motion denied.

Exception.

Recross-examination by Mr. Wolf:

Q. Doesn't your bank loan money to bankers on their notes without any collateral whatever? A. No, sir; it does not.

Q. Doesn't it loan it to merchants? A. That is another proposition entirely; not to brokers at all. 776

Q. I am asking about bankers; do you mean to say you have never made a loan to a banker on his promissory note without collateral? A. By a banker, do you mean a broker?

Q. I mean a banker, a banking house, a co-partnership doing a banking business? A. Always against collateral.

By the Referee:

Q. You loan on commercial paper? A. We loan on commercial paper without collateral. 777

By Mr. Wolf:

Q. When you say in some cases where a broker didn't pay these demand clearance loans you charged it up to the account, what did you mean by that? A. I said there were various occasions that a broker, through an oversight, would fail to send up a check at the close of the day's business to take up his note, his account is good for it, and under a clause in the note it is made payable at the bank, and is charged to the account, the same

778 as you would charge a check; we prefer not to do it; we would rather have a regular check as a voucher and have the notes taken out of the bank every day.

Q. That is deducted from his credit account? A. Yes.

Q. If that broker does not at any time send a check you send his vouchers back to him and send back the day loan? A. We always have him send a check the next day; we prefer not to carry them as vouchers; we prefer his check; we prefer it as a canceled voucher against his check with a memorandum on the check.

779 Q. Can you conceive of any circumstances where a broker did not make a deposit before 12 o'clock, who had one of these clearance loans, where you would consider that as undue delay in making deposits?

Objected to, as the witness has already been asked that question.

The Referee: He may answer.

A. Based on experience—you ask if I can conceive of any circumstances.

Q. Yes; based on your experience? A. If a 780 broker asks for a certification at 10 o'clock in the morning for the purpose of taking up certain securities which he means to immediately deliver, and says a check would be deposited with us by 11 o'clock, and it didn't come in until 12, I should say it was undue delay.

Q. That is the only fact, or only circumstance which you can conceive of, where it would be undue delay? A. That is almost an inconceivable transaction.

Q. And that one inconceivable—almost inconceivable—transaction, that would amount to an undue

delay? A. If I watched for it, and it didn't come 781
in, I would say he was not keeping faith.

Adjourned to Friday, June 2, 1911, at 2 P. M.

NEW YORK, June 2, 1911.

Met pursuant to adjournment.

PRESENT:

THE REFEREE;

Mr. LARKIN;

Mr. FREEDMAN; 782

Mr. GARRETSON;

Mr. WOLF.

It is stipulated that if Clifford M. Washburn were called as a witness, he would testify that his individual assets and liabilities as of January 19, 1910, were as follows:

Liabilities $96,438.91
Assets 276.20

and that this stipulation may be taken with the same force and effect as his testimony.

Mr. Wolf: I offer in evidence form of promissory 783
note used by the National Bank of Commerce in the transactions testified to by Mr. Alexander. It is conceded this is the note he referred to in his testimony.

It is marked Plaintiff's Exhibit 32 of this date.

[Printed herein at pp. 444-446.]

Adjourned to Friday, June 9th, at 2 P. M.

784 NEW YORK, June 16th, 1911.

Met pursuant to adjournment.

PRESENT:

THE REFEREE,

MR. WOLF,

MR. LARKIN.

IT IS STIPULATED that there are a number of banks in the City of New York in the vicinity of Wall Street, in addition to the defendant bank and the banks referred to in the testimony of Mr. Carse and Mr. Alexander which now and for a number of
785 years past have made day or clearance loans to stock exchange houses in substantially the same manner as that referred to in the testimony of Messrs. Carse and Alexander, and that if the officers of those banks were called as witnesses they would give testimony that their banks did similar business in substantially the same manner and under the same conditions as testified to by the witnesses Carse and Alexander, except that The First National Bank of the City of New York, a bank located at the corner of Wall Street and Broadway, with a capital stock of
786 $10,000,000.00 and deposits of about $100,000,000.00 and which does some business with stock exchange brokers in day or clearance loan transactions, has conducted such business since January 1, 1910, by taking from the brokers a memorandum at the time of making the day or clearance loans, which memorandum specifies in detail the securities that are expected to be cleared by such loans but the possession of which is not given to said Bank, and which memorandum and the agreement referred to therein are as follows:

[FORM OF MEMORANDUM.] 787

".....19

FIRST NATIONAL BANK,
New York.

DEAR SIRS:

Please place to credit to-day avails of loan to us of $ with following securities as collateral.

(Here is inserted a detailed statement of securities.)

.....hereby acknowledge receipt, in trust of these securities and 788
agree to either pay above named loan or deliver said securities to you before three o'clock to-day.

Yours truly"

[FORM OF AGREEMENT.]

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK, hereby agree 789
with the said Bank that whenever the undersigned shall become or remain, directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft, or upon any endorsement, draft, guarantee, or in any other manner whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the un-

790 dersigned, or his, or their executors, administrators or assigns, namely:

1. All securities deposited by the undersigned with said Bank as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time
791 to time, and upon all property of the undersigned of every description left with said Bank for safekeeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral
792 securities to an amount satisfactory to said Bank; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned, satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall, at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either 793
to pay any indebtedness to said Bank, when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately, without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Brokers' Board or otherwise, and apply the proceeds of such sale as far as needed towards the payment of any or all of such liabilities, together 794
with interest and expenses of sale, holding the undersigned responsible for any deficiency, remaining unpaid after such application. If any such sale be at Brokers' Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of
the undersigned with said Bank then ex- 795
isting.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said Bank.

. . . . . "

and that the Bank of Manhattan Company, a State bank with a capital stock of about $2,050,000.00 and deposits of about $40,000,000.00 certifies checks against which no deposits have been made, such checks being paid off during and

796 before the close of each banking day, and no promissory note or request to loan or agreement is exacted from the broker by said bank.

The stipulation as to the testimony of bank officials heretofore set forth is to be taken subject to all objections and motions to strike out made by the plaintiff in connection with the testimony of the witnesses Carse and Alexander. The testimony which it is stipulated the bank officials would give if called as witnesses is objected to by the plaintiff on the ground that it is immaterial, irrelevant and incompetent, not binding on the plaintiff,
797 consisting of legal conclusions, no proper foundation laid for it, not the proper method of proving usage and custom, and no evidence of usage and custom and on the further ground that any evidence as to usage and custom is immaterial, irrelevant and incompetent, not binding on the plaintiff in this action, and directly tending to change, vary and contradict the terms of a written instrument, and that such testimony is not within the issues raised by the pleadings in this action, and the plaintiff moves to strike out such testimony upon the grounds set forth in the objection thereto.

798 IT IS FURTHER STIPULATED that if members of the stock exchange houses to which the said banks made the said so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was also credited the balance he had on deposit with the bank at the opening of the day.

That all of the moneys received by him in the course of his business throughout the day, from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid.

That in the course of the day he drew and had 799
certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his 800
business and to meet the general obligations thereof.

That the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans.

That he kept no separate account of the moneys 801
received on the deliveries of stock acquired by him as before mentioned, but that all the moneys received by him, in the course of the day, from whatever source, were deposited by him to the credit of his said account with the bank making the said loan.

That the said day or clearance loans were paid off by his check or checks drawn to the order of the bank, at the close of the day. That during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made

802 with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after the same were received; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for him to obtain a demand or time loan at the Stock Exchange or from some bank or banker for that purpose. It sometimes happened that some loans were effected through brokers on the
803 Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid. The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and howsoever those securities were acquired by him; or he, the broker, might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan
804 would be credited to his general account with the bank and the so-called day or clearance loan would be paid at the close of the day by check drawn against this account.

The testimony which it is stipulated that stock exchange brokers would give if called as witnesses in this proceeding is objected to by the plaintiff on the ground that it is immaterial, irrelevant and incompetent, not binding on the plaintiff in this action, speculative and conjectural, no proper foundation laid for it, and that it states legal conclusions and is not the proper method of proving any usage or custom and is no evidence of usage or custom, and on the ground that any evi-

dence as to usage and custom in this action is im- 805
material, irrelevant and incompetent, not binding on the plaintiff and tends directly to change, vary and contradict the terms of a written instrument, and that such testimony is not within the issues raised by the pleadings in this action, and the testimony which it is stipulated that the brokers would give as to what was expected or understood in the case of so-called day or clearance loans in objected to on the ground that it is immaterial, irrelevant and incompetent, conjectural and involving legal conclusions, not the proper method of proving any usage or custom, no evidence of any
usage or custom and tending directly to contradict, 806
vary and change the terms of a written instrument and the plaintiff moves to strike out such testimony upon the grounds set forth in the objection thereto.

The Referee overrules each and every objection interposed and denies each motion and the plaintiff duly and separately excepts to each such ruling.

It is stipulated that the Hanover National Bank did not use any other instruments for day or clearance loans than as testified to by Mr. Carse, being Plaintiff's Exhibits 30[A] and 31.

It is stipulated that if the officers of the Me- 807
chanics & Metals Bank and other banks doing this day or clearance loan business by means of a continuing loan agreement and a request to loan, were called they would testify that this day or clearance loan business was done in this manner and that they would testify the loans were liquidated in the same manner as they were in the banks where they were made upon a demand note, and that the stipulation with respect to the testimony of Messrs. Carse and Alexander and other witnesses apply as far as the liquidation and payment of the loans are concerned; and that the credit to the borrower from the bank under the

808 system adopted by the Mechanics & Metals Bank and other banks using that system or form of business is in the same general manner as testified to by Messrs. Carse and Alexander.

Mr. Wolf: I offer in evidence the filed proofs of claims, filed with Seaman Miller, Referee in Bankruptcy, in the matter of J. M. Fiske *et als.*, bankrupts, and in substitution of that I will file a list thereof by consent.

Said list is received and marked Plaintiff's Exhibit 33.

809 [Printed herein at pp. 446-452.]

Objected to as immaterial and irrelevant.

Objection overruled.

Exception.

No objection is made as to not producing the originals of such papers.

New York, July 14, 1911.

Present as before.

Mr. Larkin: I offer in evidence a certain pool-
810 ing agreement bearing date the first day of March, 1909, between J. M. Fiske & Company and others and James R. Keene, said pooling agreement being the basis of Action No. 1 hereinafter referred to, brought by the complainants in this action against James R. Keene and others.

It is hereby stipulated that the original of said agrement may be withdrawn and a copy thereof substituted. Said agreement is received and marked Defendants' Exhibit C.

[Printed herein at p. 471.]

Mr. Larkin: I offer in evidence letter from James R. Keene to J. M. Fiske & Company, dated March 6, 1909, acknowledging receipt of subscription of

said firm of J. M. Fiske & Company for 2,000 shares under the above pooling agreement and declaring the same operative. 811

It is hereby stipulated that the original of said letter may be withdrawn and a copy thereof substituted. Said letter is received and marked Defendants' Exhibit D.

[Printed herein at p. 473.]

Mr. Larkin: I offer in evidence agreement extending the time limit of the pool created under the above Defendants' Exhibit C to March 1st, 1910.

It is hereby stipulated that the original of said agreement may be withdrawn and a copy thereof substituted. Said agreement is received and marked Defendants' Exhibit E. 812

It is stipulated, in lieu of the production of the above extension agreement, that the said agreement was extended to the 1st day of March, 1910.

[Not printed. See p. 474.]

Mr. Larkin: I offer in evidence letter dated July 14, 1909, from James R. Keene to J. M. Fiske & Company allotting to the latter firm a 4,000-share interest in the Columbus & Hocking Coal and Iron Company pool, the latter being the basis of Action No. 2, brought by the complainants in this action against James R. Keene and others. 813

It is stipulated that the original of said letter may be withdrawn and a copy thereof substituted. Said letter is received and marked Defendants' Exhibit F.

[Printed herein at p. 474.]

Mr. Larkin: I offer in evidence letter of J. M. Fiske & Company to James R. Keene acknowledging receipt of the letter of July 14, 1909, Defendants' Exhibit F.

It is hereby stipulated that the original of said letter may be withdrawn and a copy there-

814 of substituted. Said letter is received and marked Defendants' Exhibit G.

It is stipulated in lieu of the printing of said letter that J. M. Fiske & Company accepted the terms of said agreement as set forth therein.

[Not printed. See p. 474.]

Mr. Larkin: I offer in evidence the complaints and answers in Actions Nos. 1 and 2, brought in the New York Supreme Court, New York County, for Irving L. Ernst and others, as Trustees in Bankruptcy of J. M. Fiske & Company and the individual
815 members thereof against James R. Keene and others.

It is hereby stipulated that the originals of said complaints may be withdrawn and copies thereof substituted. Said complaints and answers are received and marked, respectively, Defendants' Exhibits H, I, J and K.

[Printed herein at pp. 475-511.]

It is stipulated that the range of prices of Columbus & Hocking Coal & Iron common stock sold upon the New York Stock Exchange from January 12 to January 19 inclusive were as follows:

816

	Jan. 12	Jan. 13	Jan. 14	Jan. 15	Jan. 17	Jan. 18	Jan. 19
High	91-3/4	91-3/4	91-3/4	89 3/4	90	89	88-1/2
Low	91-3/4	91	89 1/4	89-1/4	88-3/4	87-1/4	25

It is stipulated that said stock closed on the New York Stock Exchange on the said 19th day of January at 37 and that in the course of the following two weeks the said stock ranged in price between 37 and 14.

Mr. Larkin: Mr. Referee, I move to strike out from the record Plaintiff's Exhibits 18 to 29 inclusive, being the books of the firm of J. M. Fiske & Company, on the ground that the said books have not been proved by competent evidence, and that

the entries therein are incompetent, hearsay and not proved to represent the transactions actually having taken place and not binding upon the defendant. 817

The Referee: They were put in evidence to show that they were solvent. Motion denied.

Mr. Larkin: Exception.

Mr. Larkin: I move to strike out the testimony of the witness Perley Morse in so far as the same pertains to any testimony given in respect of any of the entries in the books of the firm of J. M. Fiske & Company or in respect of any statement of assets and liabilities of said firm, on the ground that the same is hearsay and is based upon entries in the books which are not proved by competent testimony and are not properly proved. 818

Motion denied.

Mr. Larkin: Exception.

RALPH WOLF, recalled and examined on behalf of the plaintiffs, testifies as follows:

By Mr. Wolf:

Q. What is your occupation? A. I am an attorney and counsellor at law and a member of the firm of Hays, Hershfield & Wolf.

Q. Are you familiar with the two litigations of Ernst *et al.*, against Keene *et al.*? A. I am, as I have had general charge of these two litigations on behalf of the plaintiffs. 819

Q. What, in your opinion, is the maximum amount that can be recovered by the plaintiffs in these two litigations?

Mr. Larkin: Objected to as incompetent, immaterial and irrelevant.

Mr. Wolf: Mr. Larkin has offered these pleadings in evidence on the theory that the recovery in these two suits may make Fiske & Company solvent, and I want to show what the maximum amount is that they could recover.

820 The Referee: He can answer the question.
Mr Larkin: Exception.

A. In my opinion the maximum amount that can be recovered by the plaintiffs in these two suits is between $50,000 and $90,000.

CROSS-EXAMINATION BY MR. LARKIN:

Q. This suit is a suit for an accounting, is it not? A. Yes.

Q. And the theory of your complaint is that you claim the difference in price between the price of Columbus & Hocking Coal & Iron stock at the time
821 that Mr. Keene began to sell contrary to the pooling agreement and the price on the day of the failure of J. M. Fiske & Company, is it not? A. No; not exactly.

Q. You gave testimony of what you think is the limit of recovery in these suits; how do you arrive at those figures? A. In this way; I take the maximum recovery that Mr Keene is liable for; that is to say, if I estimate that the maximum liability of Mr. Keene is $350,000, then I estimate that J. M. Fiske & Company are entitled to a certain proportion of that recovery; the proportion that the subscription of Fiske & Company bears to the entire amount of the pool is the proportion of the
822 recovery they are entitled to.

Q. You think Keene is liable to pay to the plaintiffs $350,000 at least? A. I have given the maximum figure.

Q. You think he is entitled to pay that amount, obliged to pay it and —— A. I don't say that; this is a litigation for an accounting——

The Referee: He says that is the maximum recovery.

Q. And you say the proportion which Fiske & Company's subscription bears to the entire subscription of the pooling agreement is as $75,000 is to

$350,000? A. No; J. M. Fiske & Company subscribed in one pool for 2,000 shares; the entire pool was 20,000 shares. They ought to receive one-tenth of the amount recovered. They subscribed 2,000 shares in their own name and 2,000 shares for customers; that is 4,000 shares out of the total second pool of 20,000 shares. 823

Q. If Mr. Keene had not violated the obligation of this pooling agreement, the accounts of the different other subscribers to the pooling agreement that were customers of J. M. Fiske & Company—and the other customers who were carrying Hocking with J. M. Fiske & Company would have been better by the amount of the difference in the price of Columbus & Hocking Coal & Iron stock; that is to say, they would have added to their accounts the difference between the market value before and after the break? A. The question calls for a purely speculative answer. I do not wish to guess. 824

Q. Who were the other subscribers to the pooling agreement besides Fiske & Company and Fiske & Company on behalf of Levy? A. Lathrop, Haskins and others.

Q. And clients of the firm of J. M. Fiske & Company? A. No, sir."

[PLAINTIFFS REST.]

[DEFENDANTS REST.] 825

Stipulation attached to Minutes.

826 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

IRVING L. ERNST *et al.* as Trustees in Bankruptcy of Josiah M. Fiske, *et al.*,
Plaintiffs,

vs.

THE MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK,
827 Defendant.

In the above entitled cause now before Hon. Charles F. Brown as Special Master for hearing, determination and report,

IT IS HEREBY STIPULATED that the securities set forth in Plaintiffs' exhibit 6, of November 3, 1910, appearing at pages 88-89 of the record herein, were sold by the defendant for the sums and at the dates set opposite such respective securities as follows:

	Securities.	Amount Realized.	Date of Sale.
$10,000.	Wabash 1st Refdg. 4s.....	$7,439.17	Mar. 10, 1910
10 shs.	Inter-Met. Com.....	224.80	do.
828 900 "	Mo. Kan. & Texas.....	39,619.50	do.
100 "	Kerr Lake Mining.....	862.50	do.
200 "	Utah Copper.....	10,374.60	do.
100 "	Col. & Hocking Coal & Iron.	1,735.50	do.
100 "	Chic. Union Traction (Cert. of Deposit).....	385.50	do.
100 "	Northern Pacific.....	13,848.00	do.
400 "	Great Northern Pfd.....	55,742.00	do.
200 "	U. S. Steel Com.....	17,621.00	do.
100 "	Amer. Car & Foundry.....	6,760.50	do.
10 "	Sloss-Shef. Steel & Iron...	813.55	do.
10 "	Chicago & Alton	601.05	do.
$10,000.	Wabash 1st Refdg. 4s....	7,440.28	Mar. 11, 1910
100 shs.	North American.....	7,998.00	do.
300 "	Col. & Hocking Coal & Iron.	4,181.50	Mar. 14, 1910
		$175,647.45	

and that defendant received a dividend on said 100 829
shares Kerr Lake Mining Company stock on March 15, 1910 amounting to $50, making a gross total received by the defendant thereon of $175,697.45.

IT IS FURTHER STIPULATED that this stipulation may be incorporated in the record herein and be deemed in evidence as to the facts herein stipulated, without any further reopening of the cause herein, or any formal introduction of this stipulation in evidence, and this stipulation shall be submitted to the Special Master and be considered by him as in evidence.

IT IS FURTHER STIPULATED that this stipulation shall be without prejudice to the objection of coun- 830
sel for the defendant as to the materiality of such facts, and an objection and exception to such admission of such facts are hereby noted.

Dated, New York, October 10, 1911.

HAYS, HERSHFIELD & WOLF,
Solicitors for Plaintiffs.
JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant.

831

832 **Report of Special Master.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur
833 C. Sherwood, individually and as copartners composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,

Complainants,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK.

Defendant.

834 TO THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK:

This action having been referred to me as Special Master by an order of this Court bearing date October 20th, 1910, for hearing, testimony and report, I RESPECTFULLY REPORT:

That the parties and their counsel appeared before me on October 31st, 1910, and on subsequent days. That before proceeding to the hearing in the case the parties by a stipulation made before me and entered upon the stenographer's minutes waived the taking of the usual oath of the referee.

Thereafter I heard the testimony offered which has 835
been transcribed and is submitted with this report; and having heard the argument of counsel and all things having been duly considered, I report my opinion as follows:

The testimony which in its material and essential matters is uncontradicted in my opinion establishes the following facts:

I.—The defendant was at all times hereinafter mentioned and is a national bank incorporated under the laws of the United States of America and having its principal place of business at No. 33 Wall Street in the Borough of Manhattan, City and State of New York. 836

II.—On January 19, 1910, and for some time prior thereto, Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood were copartners doing business as stock brokers in the City of New York under the firm name of J. M. Fiske & Company, the said Clifford M. Washburn being a member of the New York Stock Exchange.

III.—The firm of J. M. Fiske & Company were on January 19, 1910, and had been for a long time prior thereto customers of and depositors in the defendant's bank and dealt with the defendant as 837
their bankers.

IV.—According to the general custom prevailing among stock brokers dealing through the New York Stock Exchange stocks and bonds sold on the Exchange are deliverable on the next business day after the sale, payment being made on delivery. It frequently happens that the stocks and bonds sold by a broker have been pledged by him as security for loans and to obtain such securities for delivery the broker is obliged to pay such loans or so much thereof as is necessary to release such securities.

838 V.—In order to obtain funds to pay such loans and to pay for stocks and bonds purchased in order to make delivery thereof under their contracts of sale a general custom exists among brokers and their respective banks whereby each day the bank makes a loan to the broker who is its customer, which loan is called a day or clearance loan and is made by the bank crediting to the broker's deposit account the amount requested. Such day or clearance loans are made without interest, are payable at or before the close of business on the day they are made. The loan made by the defendant to the firm of J. M. Fiske & Company hereinafter
839 mentioned was a day loan. Some banks making such loans take from the broker a demand note. Other banks, among them the defendant, make the loan on the written request of the broker. The loan hereinafter mentioned made on written request and was subject to the terms of an agreement between the defendant and said firm bearing date November 8, 1901, which is Defendant's Exhibit A in this case and is hereinafter referred to. The defendant had for several years prior to said January 19, 1910, made to the said firm similar day or clearance loans.

VI.—On January 19, 1910, at or about 10 A. M.
840 the said firm delivered to the defendant a written request of which the following is a copy:

"NEW YORK, January 19, 1910.

"MECHANICS NATIONAL BANK,
New York City.

Please loan us to-day Four hundred thousand ($400,000) Dollars, crediting this amount to our account, and oblige,

J. M. FISKE & Co."

Upon the receipt of this request the defendant credited the said firm upon its deposit account on

the books of the bank with the sum of $400,000. 841
At the time said credit was made there was a balance upon said deposit account due to said firm of $36,239.47, and about 12 o'clock of said January 19th the said firm deposited with the defendant the sum of $54,048.08 which was credited to it on said deposit account. The total credits on said account on said January 19, 1910, amounted to $490,287.55.

VII.—On January 19, 1910, there was existing and in force an agreement between the defendant and said firm which bore date November 8, 1901, which is Defendant's Exhibit A in this action, a 842
copy of which is annexed to the answer and which is applicable to the said loan of $400,000. Such agreement provided in substance that any collateral deposited by J. M. Fiske & Company with the defendant for any indebtedness could be held by the defendant as collateral for any other liability of the said firm. That the bank should have a lien on any money or property deposited with it for any liability of the said firm present or future. That the bank should have the right to call for additional security for any liability and that upon the failure of the said firm to furnish said security the debt should immediately become due and the bank 843
should have the right to sell any collateral at public or private sale and to apply any balance to the payment of any indebtedness.

VIII.—Thereafter and before 12 o'clock of said January 19th the defendant certified and subsequently paid checks drawn by said firm aggregating $276,679.67. At the time of these transactions the defendant held two promissory notes of said firm, one dated November 19, 1910, for $50,000 and one dated December 15, 1910, for $5,000. Said notes

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844 were secured by collateral deposited with and held by the defendant.

It is the claim of the defendant that at 12 o'clock on said January 19, 1910, the indebtedness of the said firm to it arising out of the aforesaid transaction was $242,201.57.

IX.—Between 11 and 12 o'clock of said January 19, 1910, Mr. Frank O. Roe, the cashier of the defendant, was informed by a clerk in the department of the receiving teller that there was a disturbance in the stock market, some trouble on the Stock Exchange and that it was rumored that J. M. Fiske
845 & Company was in trouble and there was something wrong with the financial standing of that firm.

Upon receiving this information Mr. Roe immediately ascertained how much money the said firm had drawn from the bank on that day and instructed the paying teller and the certification clerk not to pay or certify any more checks for the firm. He consulted with Mr. Knowles, the Vice-President of the bank, and after such consultation went to the office of the said firm at No. 42 Broadway and there saw Mr. Sherwood, a member of the firm. He told Mr. Sherwood that he had heard rumors about the firm to which statement he testi-
846 fied Mr. Sherwood gave him an evasive reply. He further told Mr. Sherwood that the firm had made no deposit on that day and was informed by Mr. Sherwood that a deposit was then on the way to the bank. Mr. Roe then told Mr. Sherwood that he had better give him some securities, that he ought to give him additional security on the bank's loans.

Mr. Sherwood consulted with Mr. Humphrey, his partner, and then delivered to Mr. Roe the securities a list of which appear at pages 88 and 89 of the stenographer's minutes. Mr. Roe then returned to the bank.

He testified that he was at the office of J. M.

Fiske & Company only three or four minutes. That 847
he made no inquiry of Mr. Sherwood or any one else as to the financial condition of said firm and that he made no examination of the securities which he received at the firm's office, that he took what he could get. Mr. Roe never had been at the firm's office before and he testified that it was an unusual thing for him to leave his place as cashier in the bank and go to the office of a customer to demand securities for the payment of a loan.

Upon Mr. Roe's return to the bank he ascertained that a deposit had been made during his absence of $54,048.08. He then directed the secur- 848
ities to be listed and their value ascertained and the deposit account of the said firm to be balanced and closed. A debit entry was made to the firm's account of $400,000 which was the amount of the day loan, and it was ascertained that the indebtedness of the firm to the bank was $242,201.57, whereupon Mr. Roe testified that "a loan was put through for that amount and the account balanced."

I understand him to mean by that testimony that the deposit account was credited with $242,201.57 and that amount was entered among the loans of the bank and that the bank claimed to hold as security for the payment of such loan the securities 849
received from Mr. Sherwood and the other securities which were collateral to the two notes of $50,000 and $5,000.

The closing of the account and the putting through of the loan was done without consultation with J. M. Fiske & Company and the entries made on the bank's books did not alter the transactions from what I have stated them to be.

The securities received from Sherwood were subsequently on March 10th, 11th and 14th, 1910, sold by the defendant for the sum of $175,647.45, as set forth in the stipulation of the parties dated Octo-

850 ber 10th, 1911, which is attached to the stenographer's minutes. On March 15th, 1910, defendant also received a dividend of $50 on 100 shares of stock of the Kerr Lake Mining Company, making the gross total received by the defendant from said securities $175,697.45.

X.—At the time of the delivery of the said securities to Mr. Roe by Mr. Sherwood the said firm of J. M. Fiske & Company were insolvent, their liabilities exceeded their assets by at least $300,000 and each member of said firm was insolvent. Such securities were delivered to Mr. Roe at or about 12
851 o'clock and at 12:40 P. M. the said firm informed the New York Stock Exchange by a letter that it was unable to meet its obligations.

At or about 3:25 P. M. a petition in involuntary bankruptcy was duly filed against the said partners individually and as such copartners in the office of the Clerk of the United States District Court for the Southern District of New York and such proceedings had thereon that thereafter the said firm and the individual partners thereof were duly adjudged bankrupts. All proceedings in connection with said bankruptcy were duly referred to Hon. SEAMAN MILLER as referee and the complainants
852 were duly appointed trustees in bankruptcy and have duly qualified as such.

XI.—That at the time of receiving such securities Mr. Frank O. Roe, the defendant's cashier and agent in the transaction, had reasonable cause to believe that the said firm of J. M. Fiske & Company were insolvent and that the individual members thereof were also insolvent, and had reasonable cause to believe that it was intended by said firm in the delivery of said securities to give said defendant a preference whereby it would be ena-

bled to obtain a greater percentage of its debt than 853
any other creditor of the same class.

The testimony which in my opinion establishes the foregoing facts is not in dispute and the disagreement of the parties is in the inferences to be drawn from the testimony.

The learned counsel for the defendant contends: 1, that insolvency is not established, and 2, that the defendant was not shown to have had reasonable cause to believe it was receiving a preference.

It appears that at the opening of business on January 19, 1910, the firm had for its own account or was carrying for customers 9740 shares of the common stock of the Columbus & Hocking Coal & 854
Iron Co. Between 10 A. M. and 12 o'clock the quotation of this stock on the New York Stock Exchange fell from $88.50 a share to $60 per share causing a shrinkage in the value of the firm's assets of upwards of $275,000. For a considerable period prior to January 19th the quotations of this stock on the New York Stock Exchange had been from $87 to $91 per share, and it is argued that as no change was shown to have been taken in the financial condition of the Company on January 19th that the true value of the stock was what it sold for during a reasonable period prior to January 19th and not what it was selling for at 12 o'clock 855
on that day.

There might be some force in this argument if there was any ground to believe that the stock had any substantial value, but I am convinced that it had none at any time. Its price on the New York Stock Exchange was maintained by a pool organized to inflate it, and its sudden drop on January 19th was due to the selling out of one of the pool managers. The stock never recovered its high price, falling within a few months after January 19, 1910, to $14 a share and gradually ceased to be dealt in on the Exchange.

856 It is quite clear that if the firm had attempted to realize on their holdings on the morning of January 19th or at any time prior thereto the price would have fallen.

But even assuming this stock to have been worth $88.50 the firm would not have been solvent when the securities were delivered.

The liabilities of the firm as appears upon the books as testified to by Mr. Morse the accountant and not contradicted was $904,570.02 and the amount of claims filed with the referee exceeded $1,000,000.

The assets of the firm, estimating the Columbus
857 & Hocking Coal & Iron Co. stock at $60, were $745,919.58, but this amount included claims held by the firm against customers assumed to be collectible but which are shown by the testimony to be worthless amounting to $443,835.55, which would reduce the assets to $312,085.93. If to this sum be added the difference in the quotation of the Columbus & Hocking Coal & Iron stock amounting to $277,590 the gross assets would amount only to $589,675.93, and if to this be added the possible claim against James R. Keene which according to the testimony would not exceed $90,000 the assets would not in any event exceed $679,675.93.

858 A person is insolvent within the provisions of the Bankrupt Act:

> "Whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."
>
> Bankrupt Act § 1 subd. 15.

Within this definition the firm was clearly shown to be insolvent.

The question whether the defendant was shown 859
to have reasonable cause to believe that it was intended in the transfer of the securities to give it a preference is dependent upon the testimony of Mr. Roe, the Vice-President of the defendant and on January 19, 1910, its cashier.

Mr. Roe testified that when the clerk in the receiving teller's department told him of the rumors in circulation about the firm he made no inquiry of him as to what the rumors were, nor did he make any inquiry of Mr. Sherwood or Mr. Humphrey as to the firm's financial condition nor any inquiry of any one else.

He fixed the time of the delivery of the securities 860
to him at 12 o'clock, and at 12.40 the firm notified the New York Stock Exchange that they were unable to meet their obligations. At 3.25 a petition in involuntary bankruptcy was filed against the said firm and its individual partners.

The rule applicable to the solution of the question as to reasonable cause to believe that a preference was intended appears to be well settled.

Subdivision *a* of § 60 defines a preference. It is the result of a debtor's act, if being insolvent he within four months before the filing of the petition in bankruptcy makes a transfer of his property, and the effect of such transfer is to enable the creditor 861
to whom it is made to obtain a greater advantage of his debt than any other creditor of the same class.

Creditors entitled by the Bankrupt Law to the same percentage on their debts are in the same class.

Swarts *v.* Fourth National Bank, 117 Fed. Rep., 16.

If a preference is in fact given and the creditor knows or has reasonable cause to believe that the debtor at such time is insolvent, he will be held to

862 have reasonable cause to believe that it was intended by the debtor to give him a preference.

Alexander *v.* Redmond, 180 Fed. Rep., 92, 95.

Western Tie & Timber Co. *v.* Brown, 196 U. S., 502, 508.

Toof *v.* Martin, 13 Wall., 40.

Buchanan *v.* Smith, 16 Wall., 277.

Wagner *v.* Hall, 16 Wall., 584.

In re Louis A. Eggert, 4 Am. Bk. Rep., 449.

Wright *v.* Skinner Mfg. Co., 20 Am. Bk. Rep., 527.

863 Brewster *v.* Goff Lumber Co., 21 Am. Bk. Rep., 106.

McElvain *v.* Hardesty, 22 Am. Bk. Rep., 320.

Pratt *v.* Columbia Bank, 18 Am. Bk. Rep., 406.

Dutcher *v.* Wright, 94 U. S., 553.

Pirie *v.* Chicago Title & Trust Co., 182 U. S., 438.

Benedict *v.* Deschel, 177 N. Y., 1.

It may be conceded that there are some decisions which seem to support the defendant's contention, but in this Circuit the rule is as I have stated it.

864 In Alexander *v.* Redmond, Judge LACOMBE in writing the opinion of the Circuit Court of Appeals said:

> "The result of the transfer and not the mental attitude of the transferror, is made the test. The last part of Section 60 provides that in order to set aside a preference by suit against the transferee, it must be shown that he had 'reasonable cause to believe that it was intended thereby to give a preference.' But it is surely enough to show that he had reasonable cause to believe

that there was such intent, without inquiring into the actual mental attitude of the person from whom he receives the property transferred. If he had reasonable cause to believe that that person is insolvent, and has also reasonable cause to believe that the effect of the transfer will be to enable the transferee to obtain a greater percentage of his debt than any other creditor of the same class, the requirements of the concluding part of Section 60 are fully met." 865

In re Louis A Eggert the Circuit Court of Appeals of the Seventh Circuit reviews many of the cases cited by counsel on this subject. The learned Judge writing the opinion said: 866

"The resultant of all these decisions is this: that the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge or belief in his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if the facts and circumstances with respect to the debtor's financial condition are brought home to him such as would put an ordinary prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such an inquiry would reasonably be expected to disclose." 867

In the Western Tie & Timber Co. *v.* Brown Judge WHITE said:

"If Harrison, being insolvent, to the knowledge of the Company, within the prohibited period, gave to the Tie Co. author-

868 ity to collect the sums due to him by the laborers for goods sold them, with the right, or even the option to apply the money to a prior debt due by Harrison to the Company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did. (Wilson *v.* City Bank, 17 Wall., 486.)"

869 In Benedict *v.* Deshel the Court of Appeals of this State, basing its decision upon Pirie *v.* Chicago Title and Trust Co., said:

"We think, therefore, that when a trustee in bankruptcy has proven that a debtor who is insolvent has made a payment, the effect of which will be to give one creditor a preference over others of the same class, and has supplemented this by evidence from which a jury would have the right to find that the creditor receiving the payment had reasonable ground to believe that it was in-
870 tended thereby to give a preference, he has established all that the statute requires in support of his cause of action. He need not go further, as the plaintiff herein was required to do, and seek to prove the intent of the debtor in making the payment."

Applying the rule of these decisions to the case at bar I am of the opinion that Mr. Roe when he received the securities had reasonable cause to believe that the firm of J. M. Fiske & Company were insolvent and that the effect of the transfer of the securities to the defendant would be to enable it

to obtain a greater percentage of its debt than other creditors of the same class. While Mr. Roe did not testify as to the details of the information he received from the clerk in the bank, it is apparent from what he did on receiving that information that he believed that the firm was unable to pay its debts. 871

That is the only reasonable explanation of the cancelling of the day loan, his instructions to the clerks not to pay or certify any more checks, and the closing and balancing of the account. The day loan was due at or about 3 o'clock, and if there had been any doubt in Mr. Roe's mind as to whether the firm was insolvent or not he would more likely have waited until that hour to see whether they paid the loan than to have acted in the hurried manner in which he did. 872

The information which he received, however, certainly was sufficient to have led an ordinary prudent business man to an inquiry of the firm's financial condition. Yet Mr. Roe testified that he made no inquiry whatever from any one. After being informed by the clerk that the firm was in financial trouble he consulted with Mr. Knowles, the Vice-President of the bank, and then hurried to the firm's office and demanded and received the securities in question. He made no examination of what the securities were. He took, as he says, what he could get and then returned to the bank and closed the firm's account. Having ascertained then their indebtedness to be nearly a quarter of a million dollars he then, as he says, put through a loan for that amount against which he claimed the bank held as collateral the securities which had been received from the firm. 873

The hurried manner in which Mr. Roe acted indicates clearly that he feared that the firm would be unable to pay the bank its day loan before 3 o'clock when it would have been due.

874 Under the circumstance, in my opinion, he was bound to make inquiries of Mr. Sherwood and Mr. Humphrey as to the firm's condition. He could not wilfully refrain from making inquiry and then plead his lack of knowledge as a defense to this action, and he is chargeable with knowledge of such facts as inquiry would have revealed. At the time he received the securities the firm was on the eve of failure and their suspension was announced by themselves to the New York Stock Exchange within forty minutes after Mr. Roe left their office. If he had asked Mr. Sherwood or Mr. Humphrey what the firm's condition was he would undoubt-
875 edly have been informed of that fact.

In this action, therefore, the defendant must be deemed to have had such knowledge as Mr. Roe would have obtained if he had made an inquiry as to the firm's condition.

In Wagner *v.* Hall it was held that when the debtor is in fact insolvent and the means of knowledge at hand and such facts and circumstances were known to the creditor receiving security or payment as were sufficient to put a person of ordinary prudence upon inquiry, it is well settled that it would be such creditor's duty to make all reasonable inquiries to ascertain the true state of
876 the case.

The defendant must be deemed, therefore, to have had knowledge that the firm was insolvent and having such knowledge to have had reasonable cause to believe that the effect of the transfer would be to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

The defendant is among a class of general creditors whose claims aggregate a million of dollars, and it is clear from the testimony that such creditors would receive but a small percentage of their claim. If the defendant be permitted to have the securities transferred to it, it will receive nearly

the full amount of its claim and will, in the lan- 877
guage of the statute, "obtain a greater percentage of its debt than will be obtained by the other creditors of the same class."

In my opinion, therefore, the plaintiffs are entitled to have the transfer of the securities delivered to Mr. Roe set aside and recover the value thereof unless some of the special defenses are sustained.

The defendant has pleaded that the securities in question were delivered to it pursuant to a custom whereby advances made on day loans

> "should either be paid off at various times 878
> throughout the day during which said advances were made, out of the proceeds of securities which were deliverable by the borrowers on said day, or in the event of the payment of said advances not being made in full by the close of business on said day, the remainder of said advance should be secured by the deposit by the borrower, before the close of business on the same day, of securities obtained by the said firm with the proceeds of said advance or advances," (fol. 24 of Answer)

which custom it is alleged entered into and became 879
a part of the contract for the payment of each day loan made by the defendant to the firm.

I have considered and discussed the testimony as to this custom in the case of Hotchkiss against the National City Bank of New York which was tried before me at the same time as the case at bar.

In that case, as in this, Mr. Henry R. Carse, Vice-President of the Hanover National Bank, and Mr. James S. Alexander, Vice-President of the National Bank of Commerce, were called as witnesses by the defendant to prove the existence of the custom and there was the same stipulation as

880 to other banks and as to the testimony of brokers as there is in the case at bar.

I repeat here, therefore, what I said in the case of the National City Bank as to this testimony.

"Mr. Kilborn testified:

> "It is the custom in Wall Street and has been for a good many years that banks furnish a credit so that brokers can clear their stocks. The bank in issuing that credit, it is not a pure credit by any means, it is a credit which is extended so that they can pay up their loans so called and take up securi-
881 ties which they had purchased, with the understanding that this credit is to be made good either by check or the placing of a loan with you to make good that credit which you extended to them." (8 .M., p. 129.)

Mr. Carse, the Vice-President of the Hanover National Bank testified as follows, as to the custom of the Hanover Bank in making day loans:

> "The broker, in the morning, figuring up the amount of stocks or securities he has to pay for or the loans that he has to turn over, makes up a demand note for a round
882 amount, and sends it up to our loan desk with his pass book; we make a loan for the amount, enter it in the pass book, and credit it on the ledger; a memorandum of this amount is made on the certification book, together with the amount of balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account and against such credits we certify checks that are presented during the course of the day by the broker. When the day's work is cleared up the broker sends

up a check to the loan clerk for the same amounts as the notes; we stamp the note 'Paid' and return it to him, and the check going through the books as a charge, offsets the credit that was made on the loan in the morning. 883

"Q. Is that process repeated each day?

"A. It is repeated each day."

(S. M., p. 187.)

Mr. Alexander, Vice-President of the National Bank of Commerce, also gave testimony as to the custom prevailing in his bank. As it appears that the National Bank of Commerce always requires from the borrower a note in which it is stipulated that the stocks, bonds and other securities, or the proceeds thereof, purchased by the borrower, with the money loaned by the bank shall be by the borrower or his agent held in trust for the bank or deposited with it, and be subject to the lien and control of the bank as pledgee, it is unnecessary to refer to his testimony. 884

Mr. Alexander's knowledge of the custom relating to day loans was confined to those made by the National Bank of Commerce, and he had no knowledge as to the custom of other banks. The loans made by his bank were governed in all instances by special contracts and not by general usage. A copy of the note used by the National Bank of Commerce appears in the stenographer's minutes at page 233*b* and 233*c*. 885

It was stipulated that the First National Bank makes day loans to its customers, but that as to all loans made by it the brokers enter into a written contract with the bank by which the broker agrees to hold certain specified securities obtained with the proceeds of the loan in trust for the bank (S. M., p. 234).

It was also stipulated that there were a number

886 of other banks in the vicinity of Wall Street which made day loans to their customers "in substantially the same manner as that referred to in the testimony of Messrs. Carse and Alexander, and that if the officers of those banks were called as witnesses they would give testimony that their banks did similar business in substantially the same manner and under the same conditions as testified to by the witnesses Carse and Alexander" (S. M., p. 234).

That the Bank of Manhattan Co., a State bank, certifies checks against which no deposits have been made, such checks being paid off during and before
887 the close of each banking day, and no promissory note or request to loan or agreement is exacted from the broker by said bank (S. M., p.237).

It was stipulated "that if members of the Stock Exchange houses to which said banks made the so-called day or clearance loans were called as witnesses herein each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was credited the balance he had on deposit with the bank at the opening of the day. * * * That in the course of the day he drew and had cer-
888 tified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to

meet the general obligations thereof. That the se- 889
curities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans" (S. M., pp. 238, 239).

This testimony fails to show the existence of any custom by which the securities obtained by the broker with the proceeds of the day loan were pledged as security for any part of such loan.

890

No witness testifies to such a transaction. Mr. Carse mentions only one case where securities obtained by the day loan were pledged to the Hanover Bank and in that case the pledge was to secure a new demand loan the proceeds of which were used to pay the day or clearance loan. In all other cases the loans made by the Hanover National Bank were repaid at or before the close of the day upon which they were made.

Mr. Alexander was able to mention only one instance where a day loan of the National Bank of Commerce was not paid on the day it was made. In that instance he testified the broker's securities 891
were locked in a vault and Mr. Alexander obtained a paper in the nature of a trust receipt which specified the securities and a new loan was made with which the day loan was paid. The sole purpose of the new loan, Mr. Alexander testified, was to obtain interest thereon over night.

No other instances are cited by any witness where the day loan was not paid on the day it was made.

The conditions, therefore, do not exist out of which any custom or usage could arise. A custom as to securing unpaid debts cannot arise where all

892 debts are promptly paid. If there are no unpaid debts and no debtors in default, there can be no established usage in relation to unpaid debts.

Custom or usage arises out of long continued practice. It is properly defined as a course of dealing or long established method or practice, a mode of conducting transactions of a particular kind. It is a fact to be proven by witnesses who have had actual experience of the acts out of which custom grows.

Mills *v.* Hallock, 2 Ed. Ch., 651, 655.
Ames Co. *v.* Kimball Co., 125 Fed. Rep., 332.
893 Home Ins. Co. *v.* Weide, 78 U. S., 438, 439.

In the absence of such testimony as referred to no custom or usage is shown to exist.

In my opinion, however, it is quite clear, considering the purpose for which day loans are made by banks to Stock Exchange brokers, that no such custom could exist. To have it obligatory upon the broker, either by custom or contract, to pledge with the bank the securities obtained with the day loan would defeat the purpose of the loan and the intent of the parties making it.

On each day a broker has three classes of con-
894 tracts to perform:

1. Loans to be paid.

2. Contracts for the purchase of securities.

3. Contracts for the sale of securities.

To perform the first two he needs large sums of money. To perform the third he needs the securities he obtains by performing the first two. He obtains the money that he needs from his bank on his demand note as a day loan; he uses this money to pay for stocks deliverable to him and to pay such loans maturing which are secured by stocks

and other securities, and he uses the securities thus 895
obtained to make deliveries of stocks which he has sold. It is clear that if he could first make delivery upon his contracts of sale and obtain the purchase money upon such contracts, he could use the money thus obtained to pay off his loans or to pay for stocks deliverable to him and day or clearance loans would be unnecessary. But this he is unable to do because of the magnitude of the transactions and the fact that the deliveries under contracts of sale and contracts of purchase proceed simultaneously.

The learned counsel for the defendant upon his brief says:

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> "In New York, securities are deliverable on the day following their sale. The transactions are of such exceptional magnitude that it would not be possible to conduct the business with the capital of the brokers who are engaged in it. They are enabled to pay for the securities which they purchase only by the proceeds of the securities which they sell. But the deliveries of purchases and sales proceed simultaneously. Consequently, the broker is obliged to obtain temporary credit to pay for the securities deliverable to him, while he is receiving the proceeds of the securities 897
> which he is delivering to his purchasers. * * * The resources of private capitalists are obviously unequal to such a strain."

This is a clear and correct statement of the situation which each day brokers and banks in Wall Street must meet. The broker must have financial assistance to carry out his contracts because "deliveries of purchases and sales proceed simultaneously."

The day's business must be done between 10 A. M. and 3 P. M., and it is impossible for any one

broker to so arrange his business that he may make deliveries upon his contracts to sell before deliveries under contracts to purchase are made to him.

While, therefore, it is necessary for the broker to have financial assistance in the shape of a day loan to pay for stocks delivered to him, it is equally necessary that he have the use of the stocks delivered to him to make deliveries himself. And this the banks making the day loan permit him to do. So far from demanding or requiring that the stocks obtained by the proceeds of the loan shall be delivered as security for the day loan or any part of it, the broker with the consent of the bank uses such securities to make delivery upon his contracts, and with the money received upon such contracts of sale he pays his day loan.

In other words, the result of the day's transactions leads to payment of day loans and not to their security, and such is the understanding and intent of both borrower and lender.

This conclusion is clear from the stipulations made in this case in reference to the testimony of brokers wherein it is agreed that members of Stock Exchange houses if called as witnesses would testify:

> "That the securities he received as aforesaid were not kept separate, but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all time used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans."

This testimony makes it perfectly clear that the brokers make free use of the securities they obtain

with proceeds of the day loan in their daily busi- 901
ness, and that such securities with the consent of the banks are used to make deliveries on contracts of sale or pledged to secure new demand or time loans.

I am unable to see how the day loan could be of any benefit to the broker, unless, as the stipulation quoted states, the securities obtained by the day loan "were freely and at all times used by him (the broker) to make deliveries on sales made in the course of his business or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans."

While it appears that some of the banks making 902
these day loans take from the broker a note or agreement which specifies the securities to be delivered to the broker, and in some instances an agreement upon the part of the broker to hold such securities in trust for the bank, such agreements are waived daily by the banks in all transactions with the brokers.

It is clear from the testimony of Mr. Alexander that such is the case in loans made by the National Bank of Commerce. In Mr. Alexander's long experience he knew of no instance where the performance of the agreement had been enforced and during that long period with loans amounting 903
daily to many millions of dollars made day after day to the same brokers for the same purpose, the brokers have been permitted to use the securities obtained by such loans to make deliveries under their contracts to sell or to borrow money upon from other banks or individuals using such securities as collateral for the payment of such loans.

The waiver of this part of the contract grows out of the nature of the broker's business and his necessity to have the use of the securities obtained with the day loan. If he could not have the use of

904 such securities, the purpose of obtaining the day loan would be defeated.

In my opinion, therefore, no custom or usage is shown to exist between banks in the City of New York and Stock Exchange brokers in reference to day loans whereby the payment of any part of such day loans which may be unpaid at the close of business on the day when said loans were made is to be secured by the pledging of securities obtained by the proceeds of the day loan."

There is nothing in the testimony of Mr. Roe in this case as to the alleged custom which conflicts with what I have quoted from the case of the
905 National City Bank.

Mr. Roe testifies as to two instances in which the firm of J. M. Fiske & Company apparently were unable to pay the day loan out of their deposits, and securities were sent by them to the bank at the close of the day. In each instance, however, a new loan was made by the defendant to the firm and credited to the firm's account and the day loan marked paid.

The important inquiry, however, is whether the securities sent to the bank in the cases referred to by Mr. Roe were obtained with the proceeds of the day loan. Mr. Roe does not so testify and there is
906 no proof that in either instance they were.

According to Mr. Roe's testimony it was the custom to pay the day loan each day. If the deposits were not sufficient to pay the loan another loan was made for the necessary amount. His testimony on this point on cross-examination is as follows:

> "Q. Will you please state what the custom is?
>
> A. It is customary for the broker either to send his check to cancel the daily advance, or for us to charge it up without receiving a check from the broker.

Q. Charge what up? 907

A. Charge it out of the account; charge the advance charged; debit the account.

Q. I say about paying the loan; my question was with reference to the payment of the loan?

Objected to unless the question contains the entire question.

Mr. Larkin: Will the stenographer read the question substituting the word 'pay' for the word 'discharge.'

The question is read to the witness as follows: 908

'Q. Is there any custom prevailing between banks and brokers with reference to the method of paying these daily loans made by banks to brokers, in the event that the deposits made from checks received in the manner you have described, are not sufficient to repay the loan'?

A. If the checks and deposits are not sufficient the loan is cancelled; another loan is put through for the proper amount that is necessary.

Q. Does that pay the loan?

Objected to. 909

Objection sustained.

Exception.

Q. Is there any general custom prevailing between banks and brokers with reference to the manner of paying or securing these daily loans, when the amounts of the deposits are not sufficient to pay the loans?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception.

910 A. If the deposits are not sufficient to pay the loans a loan for a different amount can be substituted for the original amount.

Q. I ask you if there is any general custom, and if so what the general custom is; not what they *can* do?

Same objection, ruling and exception.

A. The general custom is that if the checks or deposits are not received in sufficient amounts to cancel the advance which has been made, a loan for a sufficient amount would be entered, and the loan canceled.

911 A. When you say 'A loan for a sufficient amount would be entered' would that be a loan without collateral?

Objected to.

Objection sustained.

Exception.

Q. Describe the loan that would be entered on the books and the nature of that transaction?

Objected to as a suppositious question; the witness has a right to prove a general custom under your Honor's ruling.

912

Objection overruled.

Exception.

A. No.

By the Referee:

Q. You gave J. M. Fiske & Company credit on your books of $400,000 at their request on that morning?

A. Yes.

Q. You credited that to their account?

A. Yes, I credited that to their account.

Q. And they could draw their checks against it? 913

A. Yes.

Q. At the time you made that credit you had no collateral security for that loan?

A. There were no securities handed in at the time the loan was made.

Q. Then you had none?

A. No.

Q. During the day you expected them to make deposits to their account?

A. We expected them to make deposits, or furnish us with security.

Q. And at the close of the day suppose their deposits or the security was $250,000, leaving a balance to their credit of $150,000 that you had given them in the morning. You would have no security at the close of the day for that $150,000? 914

A. We should be short the security.

Q. Is there any general custom among banks as to what the broker does under that situation?

Same objection, ruling and exception.

A. The broker would——

Q. Is there any general custom prevailing between the banks and the brokers in reference to that? If there is, you must know it? 915

A. Yes.

Q. Well, what is it?

A. The custom would be for the broker to hand us additional collateral, or checks for a sufficient amount to make his account balance.

Q. Suppose he don't do that; is there any custom that governs the bank under those circumstances?

A. In case the broker fails entirely to make good?

916 Q. Yes.

A. Well, it doesn't occur very often you know."

In the case of Hotchkiss *v.* National City Bank I have also discussed the contention of the learned counsel for the defendant based upon the doctrine of subrogation and the claim that the defendant has equities superior to other creditors which entitle it to hold the securities delivered to it.

In the case of the National City Bank it appears that all the securities delivered to the bank had been obtained by the brokers by payment of loans
917 with the proceeds of the day loan or obtained by substituting in their place as collateral for loans securities obtained by said firm upon payment of loans by means of certified checks drawn upon and paid by the bank.

It is claimed by the defendant that that condition exists in this case, and according to the schedule attached to the brief it would appear to be so as to some of the securities but not as to all. But whether this is so or not the facts do not bring the case within the doctrine of subrogation, and all the cases cited by the learned counsel are the same as those I considered in the National City Bank case. I repeat here what I said in my opin-
918 ion in that case upon the question of subrogation.

"There was no agreement express or implied that the defendant should be subrogated to the rights of the creditor whose loan was paid. The firm of Lathrop, Haskins & Company were at liberty to make use of such securities as they obtained in the payment of loans in any way they chose. Upon the payment of the prior loan the securities which were in that way released passed into the hands of Lathrop, Haskins & Company to be used by them freely in their business.

As there was no fraud or misrepresentation in obtaining the day loan and no departure by the

borrower in the use made of the money from the purpose intended by the parties, there is no equitable rule which would give the defendant a lien on such securities. 919

If the firm had not failed but had simply neglected to pay the day loan by 3 P. M., there would not be the slightest basis for the application of the doctrine of subrogation, and the fact that the firm became insolvent and became bankrupt does not, of course, change the rights of the parties from what they otherwise would have been.

None of the cases cited by the learned counsel for the defendant support his contention.

In Stevens *v.* King, 84 Me., 291, a vendee of real estate at the request of the vendor paid the consideration for the purchase to certain parties having suits pending against the vendor to enforce liens claimed due to them. After such claims had been paid other parties procured attachments upon the property before the deed was recorded. Held that the grantee could be subrogated to the ownership of the claims paid. 920

In Dunlop *v.* Adams, 174 N. Y., 411, a mortgagee to protect his mortgage was compelled to pay ground rent and taxes which ought to have been paid by the lessee and which he refused to pay. It was held by said payment the mortgagee became an equitable assignee of the lessor's claims paid by him and subrogated to his rights and entitled to maintain the same action against the lessor which the lessor could have maintained. 921

In Atlantic Trust Co. *v.* Kinderhook R. R. Co., 17 App. Div., 212, nothing applicable to this case was decided.

In Louis *v.* Bauer, 35 App. Div., 287, it was held that a bank which held a deed of real estate as security for a loan and which advanced money to redeem a prior mortgage was entitled to be paid the amount advanced out of surplus moneys under the

922 rule that one who redeems a security is entitled to be subrogated thereto whether or not a special agreement to that effect was made.

In Peters *v.* Meyer, 72 App. Div., 585, a person who advanced moneys to pay off a first mortgage on real estate and who by mistake was given a new mortgage instead of having the old one assigned to him was held to be subrogated to the rights of the old mortgagee as against a mortgagee who held a second mortgage on the property.

In Gans *v.* Thieme, 93 N. Y., 225, the plaintiff had advanced money to executors of one Herman Thieme at their request to pay a mortgage upon real
923 estate owned by said Thieme at his decease and for which he was personally liable. The mortgage was paid and canceled and a new bond and mortgage was given the plaintiff by the executors which proved not to be a valid lien upon the land. The Court held that the plaintiff was entitled to have the original mortgage restored to the record and be subrogated to the rights of the original mortgagee.

In Pease *v.* Egan, 131 N. Y., 262, it was held that a contingent devisee of real estate who advanced money to pay a mortgage on such real estate was entitled as security for the money ad-
924 vanced to the mortgagee which she paid and such devisee having died and the title to the real estate never having vested in her, the plaintiff, who was executrix of her will and sole legatee was entitled to be subrogated to the rights of the mortgagee.

In Morehouse *v.* Brooklyn Heights R. R. Co., 185 N. Y., 520, it was held that a Railroad Company which had settled a claim for damages with the plaintiff's client (the plaintiff having a contract with his client to be paid 50% of what was recovered in the action by way of settlement or otherwise) became a surety to the client for the payment of the attorney's fee and the client not having paid the fee the Company was subrogated to the rights

of the client and in an action to recover the fee 925
from the Railroad Company was entitled to avail itself of all the defense the client had.

In Title Guarantee & Trust Co. *v.* Haven, 196 N. Y., 487, the plaintiff paid a forged check drawn upon a depositor's account in the name of an executor of Andrew H. Green, the proceeds of which check were applied to discharge an assessment upon the defendants' lands. It was held that the plaintiff was subrogated to the rights of the City and entitled to enforce said assessment against the land; but it appearing that the land had been sold by the defendants free and clear of the assessment and they having received the money the plain- 926
tiff was entitled to a money judgment against the defendants.

In deciding this case the Court said:

> "Upon the facts as found by the referee we have here the case of a purely gratuitous payment of assessments, constituting at the time a lien in favor of the City of New York upon lands owned by the defendants, which payment was clearly induced by the fraud and forgery of some party unknown."
>
> "It must be distinctly understood that this view is predicated upon the assumption that the payment of the assessments was 927
> purely gratuitous and in nowise in discharge of any real or supposed obligation upon the part of the estate of Andrew H. Green or of the unknown forger, but was brought about solely by mistake induced by the forgery."

None of these cases sustain the contention of counsel. Stevens *v.* King, Dunlop *v.* Adams, Louis *v.* Bauer, Peters *v.* Meyer, Gans *v.* Thieme and Pease *v.* Egan are all based upon the familiar rule that if a person stands in such relation to the premises that his interest whether legal or

928 equitable cannot otherwise be adequately protected, the transaction will be treated in equity as an assignment.

Morehouse *v.* Brooklyn Heights R. R. Co. was based upon the doctrine of suretyship. The Title Guarantee & Trust Co. *v.* Haven was based upon a finding of fraud practiced upon the plaintiff of which the defendants had received the benefit.

In the case at bar none of these elements exist. The defendant in making the day loan received precisely what it contracted for and its rights are expressed in the promissory note which was delivered to it.

929 When a person pays the debt of another and is held to be subrogated to the rights of the creditor whose debts are discharged, the debt, although paid and satisfied in form, is regarded in equity as still existing; but by operation of law the former holder ceases to be the creditor while the person paying takes his place as owner of the debt and security unimpaired.

Arnold *v.* Green, 116 N. Y., 566.

In this case it was the intent of the parties that the debts for which the securities in question were pledged should be paid with the proceeds of the day loan and when paid that the securities should
930 be released from the lien theretofore existing upon them. Thereafter the borrowers were free to sell or pledge these securities, and there is no rule of equity by which the debt paid or the loan which was discharged can be reinstated.

What I have already said disposes of the final claim of the defendant that its superior equity over other creditors must be recognized.

The defendant had no lien upon the securities in question, and at the time of the delivery of the securities to its agents it had no pre-existing right to a lien thereon. Its right to a lien was defined in the demand notes delivered to it by the said firm

and did not include the right to a lien upon securi- 931
ties obtained by the firm with the proceeds of the day loan.

In Sexton *v.* Kessler, 172 Fed. Rep., 535, cited by the learned counsel for the defendant there was a pre-existing agreement under and pursuant to which certain securities were actually set apart and separated from the other property of the debtor and appropriated to the security of the creditor.

This act under the agreement the Court held to be in the nature of a mortgage upon the securities in favor of the creditor, valid against the trustee in bankruptcy without an actual change of pos- 932
session.

Hurley *v.* Atchison, Topeka & Santa Fe R. R. Co., 213 U. S., 126, did not involve securities for the loan of money at all but an advance payment for coal agreed to be mined and delivered to the Railroad Company. The Supreme Court held this appropriation to be in equity a pledge or hypothecation of unmined coal to the extent of the payment made, with which the trustee in bankruptcy equally with the bankrupt was bound to comply.

Neither of the cases cited have anything in common with the transaction presented in the case at bar, which was a loan of money upon terms clearly expressed in the notes of the borrower and which 933
gave the defendant no right to the specific securities in question."

In my opinion the transfer of the said securities by the said firm to the said defendant on January 19, 1910, constituted a preference as defined in § 60 of the Bankrupt Law. That the transfer was voidable by the complainant and he is entitled to a decree in accordance with the prayer of the complaint.

So far I have considered only the defendant's

934 right to the securities delivered to Mr. Roe by Mr. Sherwood at 12 o'clock on January 19, 1910.

It remains to consider the claims of the complainants that they are entitled to recover the balance standing to the credit of the firm on the morning of January 19, 1910, amounting to $36,249.37 and the amount of the deposit of $54,048.08 which was made by the defendant about 12 o'clock on that day, both of which were appropriated by the defendant to the payment of the indebtedness due it when it balanced the account.

The item of $36,249.37 represented the balance to the credit of the firm at the close of business on
935 January 18th. The defendant was a debtor to the firm for this sum, and it was clearly the subject of a set off against any indebtedness of the firm to the bank.

The deposit of $54,048.08 cannot, however, in my opinion be so treated. This deposit was made during Mr. Roe's absence from the bank and while he was at the office of the firm.

Prior to leaving the bank Mr. Roe had directed the certification clerk and the paying teller not to certify or pay any more checks drawn by the firm. The deposit was received by the bank after this direction was given and Mr. Roe was informed of it
936 by Mr. Sherwood while he was at the firm's office. Upon his return to the bank he immediately directed the firm's account to be balanced and closed. The deposit was immediately applied to the payment of the firm's indebtedness and a loan for the balance claimed to be due by the bank from the firm entered upon the bank's books.

It is plain from these facts that the bank never held the deposit as a banker and the firm never had the right to draw against it. The deposit was made when the firm was insolvent and applied by the bank to the payment of the indebtedness to the bank by it when Mr. Roe had reasonable cause to

believe that the firm was insolvent. The bank 937
treated the deposit as a payment on the firm's indebtedness, and I am unable to distinguish between it and the receipt of the securities as a preferred payment to the defendant.

In my opinion it was a preferential transfer within the provisions of § 60 of the Bankrupt Act.

In my opinion the transfer of the securities in question by the said firm to the defendant on January 19, 1910, and the delivery to it of the deposit of $54,048.08 constituted a preference as defined in § 60 of the Bankrupt Act. That transfer is voidable by the complainants and they are entitled in accordance with the prayer of the complaint to a 938
decree that the defendant repay to them the sum of two hundred and twenty-nine thousand seven hundred and forty-five 53/100 dollars ($229.745.53) with interest on one hundred and fifty-six thousand and twenty-seven 67/100 dollars ($156,027.67) from March 10th, 1910; on fifteen thousand four hundred and thirty-eight 28/100 dollars ($15,438.28) from March 11th, 1910; on four thousand one hundred and eighty-one 50/100 dollars ($4,181.50) from March 14th, 1910; on fifty dollars ($50) from March 15th, 1910; on fifty-four thousand and forty-eight 08/100 dollars ($54,048.08) from January 19th, 1910.

939

All of which is respectfully submitted.

Dated October 11th, 1911.

CHARLES F. BROWN,
Special Master.

(Endorsed): "U. S. District Court, S. D. of N. Y.—Filed Oct. 11, 1911."

940 **Defendant's Exceptions to Report of Special Master.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD J. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,

941

Complainants,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

942

Defendant.

Defendant's Exceptions to Report of Special Master.

And now comes The Mechanics and Metals National Bank of the City of New York, the defendant herein, and excepts to the report of Charles F. Brown, Esq., the Special Master, filed in this cause on the 11th day of October, 1911, and for cause of exception shows:

FIRST EXCEPTION:—For that the said Master in his said report stated and certified that at the time of the delivery of the securities delivered to Mr.

Frank O. Roe, the cashier of the defendant, by Mr. 943
Sherwood, set forth in Complainants' Exhibit 6, the firm of J. M. Fiske & Co. were insolvent, their liabilities exceeding their assets by at least $300,000, and each member of said firm was insolvent, whereas the said Master ought to have found that there was no competent proof as to the financial status of the said J. M. Fiske & Co. or of the individual members thereof at the time of the delivery of said securities to Mr. Roe by Mr. Sherwood, and that the aggregate of the property of said firm, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay creditors, was at a fair 944
valuation sufficient in amount to pay its debts.

SECOND EXCEPTION:—For that the said Master in his said report stated and certified that at the time of receiving such securities, Mr. Roe, the defendant's cashier and agent in the transaction, had reasonable cause to believe that the said firm of J. M. Fiske & Co. was insolvent and that the individual members thereof were also insolvent, and had reasonable cause to believe that it was intended by said firm in the delivery of said securities to give said defendant a preference whereby it would be enabled to obtain a greater percentage 945
of its debt than any other creditor of the same class, whereas the said Master ought to have found that at the time of the receiving of such securities the defendant had not reasonable cause to believe that the said firm of J. M. Fiske & Co. and the individual members thereof were insolvent and that said defendant had not reasonable cause to believe that it was intended by said firm in the delivery of said securities to give to said defendant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

946 THIRD EXCEPTION:—For that the said Master in his said report stated and certified that the common stock of the Columbus & Hocking Coal & Iron Company on the 19th day of January, 1910, did not have any substantial value at any time and that its price on the New York Stock Exchange was maintained by a pool organized to inflate it, whereas the said Master ought not to have found said facts nor any of them because no competent evidence thereof was offered.

FOURTH EXCEPTION:—For that the said Master in his said report stated and certified that the lia-
947 bilities of the said firm of J. M. Fiske & Co. were $904,570.02, whereas the said Master ought not to have found the liabilities of said firm of J. M. Fiske & Co. in said amount or any other amount, because no competent evidence as to the liabilities of said firm was offered.

FIFTH EXCEPTION:—For that the said Master in his said report stated and certified that the assets of the said firm of J. M. Fiske & Co. were $745,919.58, which sum included claims held against customers assumed to be collectible which proved to be worthless to the extent of $443,835.55, allowing which sum would reduce the assets of said firm
948 of J. M. Fiske & Co. to $312,085.93, whereas the said Master ought not to have found said facts or any of them because no competent evidence as to the amount of the assets of said firm of J. M. Fiske & Co. or of the value of the claims of the said firm against its said customers was offered.

SIXTH EXCEPTION:—For that the said Master in his said report stated and certified that the value of a possible claim against one James R. Keene and others would not exceed $90,000, whereas the said Master ought to have found that the value of said claim was to be determined only as the result of an

accounting, as shown by the pleadings in said actions, Defendant's Exhibits H, I, J and K, and that the amount which could be recovered in said actions for damages for breach of trust by said Keene as syndicate manager was such a sum as would have made the firm of J. M. Fiske & Co. and the individual members thereof solvent, and enabled it and them to pay all its and their debts and liabilities. 949

SEVENTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exceptions taken at the time, as shown by the record, one Perley Morse, an expert accountant, to testify that he had found the books of J. M. Fiske & Co. correctly kept and that the same represented genuine transactions, when in fact the evidence of said Perley Morse was not admissible because incompetent and because the books of J. M. Fiske & Co. had not been properly proven (S. M., p. 20 *et seq.*). 950

EIGHTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exceptions taken at the time, as shown by the record, said Perley Morse to testify that the assets of the firm of J. M. Fiske & Co. on the 19th day of January, 1910, at 12 o'clock noon, were $745,657.60, consisting of various sums of money due from customers at their face value, and proceeds of sales of stocks, when in fact the evidence was not admissible because it was immaterial, incompetent and irrelevant, there being no proof that the books had been correctly kept and the books not having been properly proven (S. M., pp. 23 to 25). 951

NINTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exceptions taken at the time, as shown by the record, said Perley Morse to testify that the liabilities of said firm

952 of J. M. Fiske & Co. on the 19th day of January, 1910, at 12 o'clock noon, were $902,616.76, when in fact the evidence was not admissible because it was immaterial, irrelevant and incompetent, there being no proof that the books had been correctly kept and the books not having been properly proven (S. M., p. 26).

TENTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exceptions taken at the time, as shown by the record, said Perley Morse to testify that taking the values of the stocks, bonds and securities agreed upon in the case
953 at bar, that the assets of said J. M. Fiske & Co. amounted to $747,919.48, and the liabilities $904,570.02, when in fact the evidence was not admissible because the same was immaterial and incompetent owing to the necessity that in order to ascertain said amount the said witness must of necessity have examined the books of the said firm of J. M. Fiske & Co. which had not been proven (S. M., pp. 183-184).

ELEVENTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exception taken at the time, as shown by the record, said Perley Morse to testify as follows:

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"By Mr. Hays: Q. In that statement you have included, as I understand it, all of the accounts on the books against various debtors as being *prima facie* good? A. Yes.

Mr. Larkin: Same objection.

Same ruling and exception.

Q. You have taken the accounts which you found on the books at their face value?

Same objection, ruling and exception.

A. Yes.

By Mr. Wolf: Q. In figuring the assets of J. M. Fiske & Company at what price was the Hocking stock figured? A. 58. 955

Q. How many shares of Hocking stock did the firm of J. M. Fiske & Company carry for its customers or have for its own account?

Mr. Larkin: Objected to on the ground that it must be that this information was derived solely from the books and is not the best evidence.

Objection overruled. Exception.

A. 9,740 shares;" 956

when in fact the evidence was not admissible because the same was irrelevant and immaterial and because of necessity it must involve an examination of the books of J. M. Fiske & Co., which same had not been proven (8. M., pp. 184 to 185).

TWELFTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exceptions taken at the time, as shown by the record, that the books of J. M. Fiske & Co. be offered in evidence, when in fact said exhibits were not admissible because the same had not been legally or properly proven and were immaterial, irrelevant and incompetent, said exhibits being Complainant's Exhibits 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 (8. M., pp. 190 to 193). 957

THIRTEENTH EXCEPTION:—For that the said Master in the trial of this cause permitted, over exceptions taken at the time, as shown by the record, one Ralph Wolf to testify that in his opinion the maximum amount that can be recovered in the actions brought by Ernst and others as trustees in bankruptcy of J. M. Fiske & Co. &c. against James

958 R. Keene and others, is between fifty and ninety thousand dollars, when in fact the evidence was not admissible because the same was incompetent, irrelevant and immaterial (S. M., p. 333).

FOURTEENTH EXCEPTION:—For that the said Master in his said report stated and certified that Mr. Roe, when he received the securities mentioned in Complainant's Exhibit 6, had reasonable cause to believe that the said firm of J. M. Fiske & Co. was insolvent and that the effect of the transfer of the securities to the defendant would be to enable it to obtain a greater percentage of its debt than
959 other creditors of the same class, whereas the said Master ought to have found that when Mr. Roe received the said securities he did not have reasonable cause to believe that the said firm of J. M. Fiske & Co. was insolvent and that the defendant, through its agent, was entitled to receive the securities delivered to Mr. Roe by the said bankrupts on said 19th day of January, 1910.

FIFTEENTH EXCEPTION:—For that the said Master in his said report stated and certified that the only reasonable explanation of the cancelling of the day loan and of Mr. Roe's instructions to the clerks of the defendant bank not to pay or certify
960 any more checks, and the closing and balancing of the account of the said firm of J. M. Fiske & Co. with said bank was sufficient to cause Mr. Roe to believe that the firm was unable to pay its debts, whereas the said Master ought to have found that its said actions and each of them were merely precautionary and pursuant to the terms of the agreement existing between the parties, and that there was no ground for causing the belief that the said firm of J. M. Fiske & Co. and the individual members thereof were as a matter of fact unable to pay their debts.

SIXTEENTH EXCEPTION:—For that the said Master in his said report stated and certified that the information which Mr. Roe received was sufficient to have led an ordinary prudent business man to an inquiry of the firm's financial condition, whereas the said Master ought to have found that the information which Mr. Roe received was not sufficient in law to lead an ordinary prudent business man to an inquiry of the firms' financial condition. 961

SEVENTEENTH EXCEPTION:—For that the said Master in his said report stated and certified that the hurried manner in which Mr. Roe acted indicated clearly that he feared the firm of J. M. Fiske & Co. would be unable to pay to the defendant bank its day loan before three o'clock in the afternoon of said 19th day of January, 1910, whereas the said Master ought to have found that Mr. Roe's actions were merely the result of excitement in the financial district owing to the disturbed condition of the stock market on the New York Stock Exchange on said 19th day of January, 1910, that his actions were merely prompted by business caution and the fact that said firm had, up to the time of the said action by Mr. Roe, made no deposit or deposits as required by the agreement existing between the parties. 962

963

EIGHTEENTH EXCEPTION:—For that the said Master in his said report stated and certified that under the circumstances Mr. Roe was bound to make inquiries of Mr. Sherwood and Mr. Humphrey as to the firm's condition, and that if he had made such inquiries he would undoubtedly have been informed of its financial condition, whereas the said Master ought to have found that Mr. Roe was not in possession of any facts nor did he have knowledge of any facts or circumstances which called upon him as a prudent man to make in-

964 quiries of Mr. Sherwood and Mr. Humphrey as to the firm's financial condition.

NINETEENTH EXCEPTION:—For that the said Master in his said report stated and certified that the defendant must be deemed to have such knowledge as Mr. Roe would have obtained if he had made inquiry of the firm's financial condition, whereas the said Master ought to have found that the defendant must not be deemed to have had such knowledge sufficient to fasten upon it a reasonable cause to believe that the said firm of J. M. Fiske & Co. was in fact bankrupt at the time of the deliv-
965 ery by it of such securities to Mr. Roe, and that Mr. Roe would have obtained the information as to the true financial status of the said firm of J. M. Fiske & Co. had he made such inquiry.

TWENTIETH EXCEPTION:—For that the said Master in his said report stated and certified that the defendant must have had knowledge that the firm was insolvent, and having such knowledge, to have had reasonable cause to believe that the effect of the transfer would have been to enable it to obtain a greater percentage of its debt than any other creditor of the same class, whereas in so finding
966 the said Master did err, because the record does not reveal sufficient evidence to support such finding.

TWENTY-FIRST EXCEPTION:—For that the said Master in his said report stated and certified that the defendant is among a class of general creditors whose claims aggregate upwards of a million of dollars, whereas the said Master ought to have found that the said defendant is not a general creditor and the said Master ought to have found that there was no other creditor of the said firm of J. M. Fiske & Co. and of the partners thereof of the same class as the defendant.

TWENTY-SECOND EXCEPTION:—For that the said 967
Master in his said report stated and certified:

"I have considered and discussed the testimony as to this custom in the case of *Hotchkiss* against *The National City Bank of New York*, which was tried before me at the same time as the case at bar.

In that case, as in this, Mr. Henry R. Carse, Vice-President of the Hanover National Bank, and Mr. James S. Alexander, Vice-President of the National Bank of Commerce, were called as witnesses by the defendant to prove the existence of the custom and there was the same stipulation as to 968
other banks and as to the testimony of brokers as there is in the case at bar.

I repeat here, therefore, what I said in the case of the National City Bank as to this testimony.

Mr. Kilborn testified:

'It is the custom in Wall Street and has been for a good many years that banks furnish a credit so that brokers can clear their stocks. The bank in issuing that credit, it is not a pure credit by any means, it is a credit which is 969
extended so that they can pay up their loans so-called and take up securities which they had purchased, with the understanding that this credit is to be made good either by check or the placing of a loan with you to make good that credit which you extended to them' (S. M., p. 129).

Mr. Carse, the Vice-President of the Hanover National Bank, testified as follows, as

970 to the custom of the Hanover Bank in making day loans:

'The broker, in the morning, figuring up the amount of stocks or securities he has to pay for, or the loans that he has to turn over, makes up a demand note for a round amount, and sends it up to our loan desk with his pass book; we make a loan for the amount, enter it in the pass book, and credit it on the ledger; a memorandum of this amount is made on the certification book, together with the amount of balance to the credit of the account at
971 the opening of business, and from time to time during the day any deposits that are made for the credit of the account and against such credits we certify checks that are presented during the course of the day by the broker. When the day's work is cleared up the broker sends up a check to the loan clerk for the same amounts as the notes; we stamp the note "Paid" and return it to him, and the check, going through the books as a charge, offsets the credit that was made on the loan in the morning.

972 'Q. Is that process repeated each day?

'A. It is repeated each day' (S. M., p. 187).

"Mr. Alexander, Vice-President of the National Bank of Commerce, also gave testimony as to the custom prevailing in his bank. As it appears that the National Bank of Commerce always requires from the borrower a note in which it is stipulated that the stocks, bonds and other securities, or the proceeds thereof, purchased by the borrower, with the money loaned by the bank shall be by the borrower or his agent held

in trust for the bank or deposited with it, 973
and be subject to the lien and control of the bank as pledgee, it is unnecessary to refer to his testimony.

Mr. Alexander's knowledge of the custom relating to day loans was confined to those made by the National Bank of Commerce, and he had no knowledge as to the custom of other banks. The loans made by his bank were governed in all instances by special contracts and not by general usage. A copy of the note used by the National Bank of Commerce appears in the stenographer's minutes at pages 233b and 233c.

It was stipulated that the First National 974
Bank makes day loans to its customers, but that as to all loans made by it the brokers enter into a written contract with the bank by which the broker agrees to hold certain specified securities obtained with the proceeds of the loan in trust for the bank (S. M., p. 234).

It was also stipulated that there were a number of other banks in the vicinity of Wall Street which made day loans to their customers 'in substantially the same manner as that referred to in the testimony of 975
Messrs. Carse and Alexander, and that if the officers of those banks were called as witnesses they would give testimony that their banks did similar business in substantially the same manner and under the same conditions as testified to by the witnesses Carse and Alexander' (S. M., p. 234).

That the Bank of Manhattan Co., a State bank, certifies checks against which no deposits have been made, such checks being paid off during and before the close of each banking day, and no promissory note or re-

976 quest to loan or agreement is exacted from the broker by said bank (S. M., p. 237).

It was also stipulated 'that if member of the Stock Exchange houses to which said banks made the so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was credited the balance he had on deposit with the bank at the opening of the day. * * * That in the
977 course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to
978 the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof. That the securities he received as aforesaid were not kept separate, but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were

substituted for other collateral then in de- 979
mand or time loans' (S. M., pp. 238, 239).

This testimony fails to show the existence of any custom by which the securities obtained by the broker with the proceeds of the day loan were pledged as security for any part of such loan,"

whereas the said Master ought to have found that the said testimony showed the existence of a custom by which securities obtained by a broker with proceeds of a day loan are pledged as security for any part of such loan.

TWENTY-THIRD EXCEPTION:—For that the said 980
Master in his said report stated and certified that the conditions do not exist out of which any custom or usage could arise, whereas the said Master ought to have found that conditions do exist out of which custom or usage did arise, and that the same were proved by competent evidence.

TWENTY-FOURTH EXCEPTION:—For that the said Master in his said report stated and specified that considering the purpose for which day loans were made by banks to stock exchange brokers that no such custom could exist, whereas the said Master ought to have found that considering the purpose 981
for which said day loans are made by banks to stock exchange brokers that said custom did as a matter of fact exist.

TWENTY-FIFTH EXCEPTION:—For that the said Master in his said report stated and specified that the result of the day's transactions leads to payment of day loans and not to their security, and such is the understanding and intent of both borrower and lender, whereas the said Master ought to have found that at the time said day loan was made and credit given to the broker upon the books of the

982 bank, the understanding and agreement and intent of both borrower and lender is that the lender shall from that time have a lien upon said funds and the avails thereof, no matter what form they shall take until payment or discharge of said day loan.

TWENTY-SIXTH EXCEPTION:—For that the said Master in his said report stated and certified that no custom or usage was shown to exist between banks in the City of New York and stock exchange brokers in reference to day loans whereby the payment of any part of such day loans which may be unpaid at the close of business on the day when said
983 loans are made is to be secured by the pledging of securities obtained by the proceeds of the day loans, whereas the said Master ought to have found that the custom and usage does exist between banks in the City of New York and stock exchange brokers in reference to day loans whereby the payment of any part of such day loans which may be unpaid at the close of business on the day when said loans were made are secured by the pledging of securities obtained by the proceeds of the day loans.

TWENTY-SEVENTH EXCEPTION:—For that the said Master in his said report stated and certified
984 in regard to two instances testified to by Mr. Roe, in which the said firm of J. M. Fiske & Co. were unable to pay the day loan out of their deposits and securities were sent by them to the bank at the close of the day, that the securities were not obtained with the proceeds of the day loan, whereas the said Master ought to have found that said securities were in fact secured by the proceeds of the day loan in force on the day of their purchase.

TWENTY-EIGHTH EXCEPTION:—For that the said Master in his said report stated and certified that there was no agreement, express or implied, that

the defendant should be subrogated to the rights of 985
the creditor whose loan was paid, whereas the said Master ought to have found that there was an agreement in force and existing between the defendant and the said firm of J. M. Fiske & Co. that the defendant should be subrogated to the rights of other creditors whose loans were paid by the use of the funds secured in said day loan.

TWENTY-NINTH EXCEPTION:—For that the said Master in his said report stated and certified that the defendant had no lien upon the securities in question and at the time of the delivery of the securities to its agents it had no pre-existing right 986
to a lien thereon, whereas the said Master ought to have found that the defendant by virtue of its loan agreement with the said firm of J. M. Fiske & Co. when read in view of the custom of the financial district respecting such day loan, had a lien upon the said securities received by it as aforesaid, and that at the time of the delivery of the same to it or its agents on the 19th day of January, 1911, it had a pre-existing right to a lien thereon, and was entitled to take the same into its possession.

THIRTIETH EXCEPTION:—For that the said Master in the trial of this cause declined, on objection 987
of the plaintiff and over exceptions taken at the time, as shown by the record, to permit Mr. Roe to testify as to what was the custom of the financial district in the method of paying off day loans, on the ground that it was incompetent, that there was no proof of any universal custom or of any custom under which the parties contracted, and that the same was irrelevant and immaterial, when in fact the evidence sought to be adduced was admissible, competent and relevant as to the proof of such custom, all of which was duly excepted to at the time, as appears by the record (S. M., pp. 108-109).

988 THIRTY-FIRST EXCEPTION:—For that the said Master in the trial of this cause declined, on objection of the plaintiff and over exceptions taken at the time, as shown by the record, to permit Mr. Roe to testify as to the general custom prevailing between banks and brokers with reference to the method of discharging these day loans made by banks to brokers in the event that the deposits made from checks received in the manner described are not sufficient to discharge the loans, which questions were competent, material and relevant to the issues, all of which was duly excepted to at the time, as appears by the record (S. M., p. 109).

989 THIRTY-SECOND EXCEPTION:—For that the said Master in the trial of this cause declined, on objections of the plaintiff and over exceptions taken at the time, as shown by the record, to permit Mr. Roe to testify that if the checks and deposits were not sufficient the day loan was cancelled and another loan was put through for the proper amount that was necessary, which questions were competent, material and relevant to the issues, all of which was duly excepted to at the time, as appears by the record (S. M., p. 110).

990 THIRTY-THIRD EXCEPTION:—For that the said Master in the trial of this cause declined, on objections of the plaintiff and over exceptions taken at the time, as shown by the record, to permit Mr. Roe to testify as to any general custom prevailing between banks and brokers with reference to the manner of paying or securing the day loans when the amounts of deposit are not sufficient to pay the day loans, which question was competent, material and relevant to the issues, all of which was duly excepted to at the time, as appears by the record (S. M., p. 110).

THIRTY-FOURTH EXCEPTION:—For that the said Master in the trial of this cause declined, on objections of the plaintiff and over exceptions taken at the time, as shown by the record, to permit Mr. Roe to testify that he expected the firm of J. M. Fiske & Co. to make a deposit before he reached their office on the 19th day of January, 1910, and declined to permit the said witness to state whether or not he had any idea whether said firm of J. M. Fiske & Co. would make such deposit, when in fact the evidence sought to be adduced was admissible and competent (S. M., pp. 103-104). 991

THIRTY-FIFTH EXCEPTION:—For that the said Master in the trial of this cause declined, on objections of the plaintiff and over exceptions taken at the time, as shown by the record, to permit Mr. Roe to testify as to whether there was any general custom prevailing between banks or brokers with reference to the act of the bank if the broker failed to make a deposit within a reasonable time after obtaining his day loan, that is to say, promptly, when in fact the evidence sought to be adduced was admissible and competent, material and relevant to prove the said facts (S. M., pp. 107-108). 992

THIRTY-SIXTH EXCEPTION:—For that the said Master in the trial of this cause declined, on objections of the plaintiff and over exceptions taken at the time, as shown by the record, to receive the answer of Mr. Roe to the effect that the custom is, if a deposit is not forthcoming immediately, to communicate with the broker upon the telephone or to send around and inquire why the deposit has not been received and to seek to hurry them in making the deposit, when in fact the said evidence was admissible as a proof of the fact, and that said answer was a proper answer (S. M., p. 109). 993

994 THIRTY-SEVENTH EXCEPTION:—For that the said Master in his said report stated and certified that the defendant is not entitled to retain the sum of $54,048.08, constituting the deposit made by the said firm of J. M. Fiske & Co. on the 19th day of January, 1910, whereas the said Master ought to have found that the defendant was entitled to retain the said sum of $54,048.08 constituting the deposit made by the said firm of J. M. Fiske & Co., in the course of business on the 19th day of January, 1910.

995 THIRTY-EIGHTH EXCEPTION:—For that the said Master in his said report stated and certified that the defendant never received or held the said sum of $54,048.08 as a deposit or held the same as a banker, and that the said firm of J. M. Fiske & Co. never had a right to draw against said sum, whereas the said Master ought to have found that the said defendant did receive the said sum of $54,048.08 as a deposit in bank and that the right of said firm of J. M. Fiske & Co. to draw against the same was absolute until the time of the failure of the said firm subsequent to said deposit and the application of the same to the indebtedness of J. M. Fiske & Co. pursuant to its agreement with the said defendant.

996 THIRTY-NINTH EXCEPTION:—For that the said Master in his said report stated and certified that the said deposit of $54,048.08 was made when the said firm of J. M. Fiske & Co. was insolvent and applied by the bank to the payment of the indebtedness to the bank by said firm of J. M. Fiske & Co. when the agent of the said defendant had reasonable cause to believe that the said firm of J. M. Fiske & Co. was insolvent, whereas the said Master ought to have found that the deposit was made when the said firm of J. M. Fiske & Co. was solvent and was received by the said defendant as a deposit and was not applied by the said defendant to the payment of the said indebtedness of the said firm

of J. M. Fiske & Co. to the defendant until subsequent to the time of the deposit, when the same was, pursuant to the terms of the agreement existing between the parties, set off against the indebtedness of the said firm of J. M. Fiske & Co. to the defendant, and said set-off was legal and according to the rights of the defendant and pursuant to the terms of the Bankruptcy Act. 997

FORTIETH EXCEPTION:—For that the said Master in his said report stated and certified that the said bank treated the said deposit of $54,048.08 as a payment of the firm's indebtedness, whereas the said Master ought to have found that said sum was received as a deposit on account of the said firm's banking account with the defendant and was set off against the said indebtedness subsequent to the deposit thereof. 998

FORTY-FIRST EXCEPTION:—For that the said Master in his said report stated and certified that the plaintiffs are entitled to have the transfer of the securities delivered to Mr. Roe set aside and to recover the value thereof, whereas the said Master ought to have found that the said securities were received by Mr. Roe as agent of the defendant in accordance with its rights therein, and that the plaintiffs are not entitled to have the transfer of the securities delivered as aforesaid set aside, and that the plaintiffs are not entitled to recover the value thereof. 999

FORTY-SECOND EXCEPTION:—For that the said Master, in the trial of this cause, in his said report stated and certified that the transfer of the securities in question to the defendant on January 19, 1910, and the delivery to it of the deposit of $54,048.08, constituted a preference as defined in Section 60 of the Bankruptcy Act that transfer is voidable by the plaintiffs and that they are enti-

1000 tled, in accordance with the prayer of the complaint, to a decree that the defendant repay to them the sum of $229,745.53, with interest on $156,027.67 from March 10, 1910; on $15,438.28 from March 11, 1910; on $4,181.50 from March 14, 1910; on $50 from March 15, 1910, and on $54,048.08 from January 19, 1910, whereas the said Master ought to have found that said transfers did not constitute a preference as defined in Section 60 of the Bankruptcy Act, and that said transfer is not voidable by the complainants and that they are not entitled in accordance with the prayer of the complaint to a decree that the defendant repay to them
1001 the aforesaid sums, with interest, as aforesaid.

FORTY-THIRD EXCEPTION:—For that the said Master in the trial of this cause in his said report stated and certified that the complainants were entitled to judgment in accordance with the prayer of their complaint, whereas the said Master ought to have found that the said complainants were not entitled to judgment in accordance with the prayer of the complaint.

FORTY-FOURTH EXCEPTION:—For that the said Master in the trial of this cause declined to dismiss the complaint herein and to find for the defendant,
1002 whereas the said Master ought to have dismissed the complaint herein and found for the defendant as to all matters alleged in its answer.

Dated New York, November 25th, 1911.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant.
Office & P. O. Address,
54 Wall Street,
N. Y. C.

Endorsed: "U. S. District Court, S. D. of N. Y.—Filed Nov. 25, 1911."

Notice of Motion to Confirm Special Master's Report. 1003

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD J. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners, composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY, 1004

Complainants,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, 1005

Defendant.

SIRS:

PLEASE TAKE NOTICE that upon the report of Charles F. Brown, Esq., the Special Master herein, filed in the office of the Clerk of this Court on the 11th day of October, 1911, and upon the testimony and exhibits filed therewith and the exceptions of the defendant filed November 25th, 1911, and upon the pleadings and all the pro-

1006 ceedings had herein, the undersigned will move this Court at a Stated Term thereof, to be held at the Court Room of said Court in the General Post Office Building, in the Borough of Manhattan, City of New York, on the 4th day of December, 1911, for an order confirming the said report of the Special Master and overruling the defendant's exceptions, and for such other and further relief in the premises as to the Court may seem just and proper.

Dated New York, November , 1911.

Yours, &c.,

1007 HAYS, HERSHFIELD & WOLF,
Attorneys for Complainants,
Office and Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

To:

JOLINE, LARKIN & RATHBONE, ESQS.,
Attorneys for Defendant,
54 Wall Street, N. Y. City.

1008

Opinion of Hand, J., in Hotchkiss vs. The National City Bank of New York.

1009

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HENRY D. HOTCHKISS, as Trustee, etc.,

AGAINST

THE NATIONAL CITY BANK OF NEW YORK.

1010

R. P. LEWIS, for the Complainant.
JOHN A. GARVER, for the Defendant.

HAND, *District Judge:*

I do not think it necessary to add anything to the Referee's report except upon two questions: first, the need of proving that the defendant knew that the bankrupts intended a preference; second, 1011 the defense of an equitable lien.

Upon the first point *Alexander* vs. *Redmond*, 180 Fed. R., 92, is conclusive. It is idle to say that the opinion is obiter. I tried the case below and being of different opinion decided it expressly because the element of an intent to prefer was lacking. The reversal was therefore expressly upon that point and the case settles the law in this Circuit.

The second point is without doubt difficult and requires careful analysis into the difference of intention between an obligation and a property right, which closely approach each other under these cir-

1012 cumstances. I shall assume two things which are at least not conceded. First, I assume that the written contracts may be varied by proof of a custom; second, that the custom would be valid if it existed and actually gave a lien upon the assets. What, then, is the defendant's position? It is this: Under the custom of banks and brokers, first, the certified cheques, when withdrawn from the bank, remain in equity still the bank's property, call the right a trust or whatever you will; second, the broker may use them only to relieve securities, either pledged or purchased, from liens upon them for money lent, or for purchase price due; third, the
1013 securities, when the broker receives them, are subject to an equitable lien equal in amount to the bank's advances upon them; and that lien remains not only upon them but upon any money or other property which the broker may get by pledging or by selling them, so that if the broker, having sold the released securities, reinvests the moneys, the lien would remain upon the new securities so purchased. In other words, the actual intention of the parties here effects, the defendant says, what the law would itself impose, if the funds were at any time in the hands of the broker affected with an equitable lien or an implied or constructive
1014 trust. Now this is a perfectly intelligible position, whether or not it be a sound one, and I must concede to the defendant that it does not seem to me to be an answer merely to show that the broker is free to pledge or sell the securities released with the bank's money, because if the custom contemplated his doing so, and also contemplated that the proceeds of such a sale or pledge should themselves be subject to the same lien, then it would not be an objection to show that the broker could in fact sell the securities.

On the other hand all that actually takes place is consistent with the absence of any lien whatever,

and with merely a restriction upon the use of 1015
the cheques to the release of securities, and a strict
requirement that the loan be paid at the close of
the day. Nothing which the brokers do indicates
that they regard the property in their hands as
subjected to any lien, because it is not enough that
they are restricted in the use of the funds. For
example, A may lend B money only on condition
that B put it in his business; A would have no
lien. Even if B were to promise A to pay him out
of the funds in his business, A would have no lien,
Dillon vs. *Barnard*, 21 Wall., 430; *Franklin* vs.
Browning, 117 Fed. R., 226; *Barrington* vs. *Evans*,
3 Y. and C., 384. Justice Clifford says in *Dillon* 1016
vs. *Barnard*, on page 439, that there must be "some
act of appropriation on the part of the employer"
(the promisor) "depriving himself of the control
of the funds, and conferring upon the contractor"
(the promisee) "the right to have them applied to
his payment when the services are rendered or the
materials are furnished." There must be a relin-
quishment by the employer of his right of dominion
over the funds, so that without his aid or consent
the contractor can enforce their application to his
payment when his contract is completed. Nothing
in the practice of the parties justifies any such
inference as that indicated.

A lien means that the lienor is to have the right 1017
to take his debt out of some specified *res*, which
may, it is true, be a changing fund, but neverthe-
less must be ascertainable since it is a property
right. To take out one's debt from a *res* is a very
much more stringent right than to restrict the bor-
rower's rights in the money you lend him, or even
to promise to pay him from a fund. It seems
hardly necessary to elaborate so obvious a distinc-
tion. *Walker* vs. *Brown*, 165 U. S., 654. Again,
the necessity of paying back the loan by three
o'clock does not indicate that the bank meanwhile

1018 has any lien upon the funds, especially as the sources of payment are, naturally enough, indifferent to the bank itself. Nor is it significant that the bank should be interested in the kind of security in which the broker deals, because the loan represents so large a part of the broker's indebtedness that its proceeds will for the time being be the greater part of his assets. Further, the need of beginning to pay back the loan by twelve o'clock shows nothing, though the evidence really shows that the brokers have till three to begin to pay, because a credit is under such circumstances naturally apt to suspicion if the debtor remains longer than necessary with so large a load of indebtedness.
1019 Indeed, the belief of a lien upon the broker's assets would rather tend to less close scrutiny of the time of his repayments.

While, therefore, the use of funds by the broker does not necessarily preclude the existence of a lien, there is nothing in the practise of business which at all requires it to be interpreted in such terms. It is quite true that these "clearance" loans are merely to enable brokers to shift about securities, but while they are shifting them, they may hold them free and clear or they may hold them subject to liens for the price. No one can *a priori* say which is more likely, and in the absence
1020 of some express provision covering the case the only interpretation which can be safely made is from the practise. Furthermore, the only occasion in practise which would throw any light would be when the question arose as to the bank's rights between the time when the cheques were certified and the loan paid. Such an occasion never arises and so the custom does not help. If there had been instances in which the bank exercised a right as lienor during that period and the broker assented, they would be material, but there are none. Even the single case which Alexander remembers in

which the broker gave security over night proves 1021
nothing, because the necessity would have been the same whether or not the "clearance" loan had been secured by a lien; because the "clearance" loan was due in any case and the broker must pay it by taking out a call loan with collateral somewhere whether or not it had been secured itself theretofore.

All the evidence of custom therefore seems to me not to help the defendant in the least; on the other hand, some of it seems to injure its cause. For instance, if the brokers kept the "clearance" loan securities separate, or in any way distinguished the bank's supposed property from their 1022
own, there might be color for the claim of a lien, but unfortunately for the bank they mix everything indiscriminately. Now it is still possible that the lien is to be regarded as existing even when for motives of convenience it is not kept defined, but upon the balance of probabilities the absence of any distinction must weigh. It would also be some evidence of intent if the "clearance" fund were not mingled with other funds in one deposit confessedly within the broker's power to use as he wishes, but they are so mingled. Again, a strong evidence of the intention of the bank is that they 1023
so expressly, and with exuberant verbiage, reserve liens upon all securities in their possession; *expressio unius exclusio alterius*. Contrast the note used by the Bank of Commerce, which reserved a lien upon all the securities while in the hands of the brokers which were purchased out of the proceeds of the loan. Of course, neither of these notes is conclusive, but each indicates that when the banks intended such an agreement they knew how to express it, and that in the case at bar the defendant expressed quite clearly a lien depending upon possession. The most reasonable understanding of the

1024 relation between the parties is that the bank relied upon the good faith of the broker to pay his loan and not to use his funds improperly, but that it had occurred to no one to consider what was the position of the bank, if the brokers should fail before the loan was paid. If that occurred it seems to me incredible that with no practice to go by, they should have left the matter without definition. The forms of the relation are all those of a debtor and creditor, the practise under it sheds no light as I have said, for obviously the banks could not exercise the rights of a lienor until there was some occasion to assert a preference. It seems pretty
1025 clear to me that the present assertion is no more than a favorable interpretation, which has no foundation in usage or expression. The bank itself, when asserting the lien, made no attempt to get only such securities as its funds had released, but gathered up all that came handy, among them stocks which had never been released by its funds, or by the substitution of securities released by such funds. It is impossible to see how from any point of view such securities were subject to a lien. The point is important only as showing that in practise the bank simply laid its hands on what it could get like any other creditor seeking an illegal
1026 preference, and that its supposed lien must have been at the time ambulatory over the whole assets of the bankrupt estate. Such a practical construction of the bank's rights is of substantial importance when the question is of the interpretation of a practise or custom.

The testimony of Carse goes a little further than the actual practise of the brokers and the bank. He in one place characterizes the relations between the two and states what they understood the legal status to be. Thus, he says on his direct-examination: "it has developed a form of trust, and the clear understanding implied between the broker and

the banker is that whatever the broker obtains by 1027
the proceeds of the loan given to him is held in trust for the account of the bank. * * * If a broker pays for stocks or bonds it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply retains possession of them long enough to make delivery and get payment," etc. Now if this witness' interpretation of the legal effect of the custom is to stand for the Court's, of course the master's decision as to the meaning of the custom is wrong, for then it is an out-and-and trust, disappearing into an equitable lien, upon payment of the certified cheques to another bank and receipt of securities 1028
in exchange. But such an interpretation is not competent evidence at all, since it in effect usurps the Court's function, which is to decide what was the "clear understanding." Moreover, it is of no consequence for another and deeper reason; a contract has strictly speaking nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual 1029
meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract that meaning will prevail, but only by virtue of the other words and not because of their unexepressed intent. Now in the case at bar, whatever was the understanding in fact of the banks and of the brokers, too, for that matter, of the legal effect of this practise between them, it is of not the slightest consequence

1030 unless it took form in some acts or words, which being reasonably interpreted, would have such meaning to ordinary men. Of course, it will be likely that if they both do understand their acts in the same way, usual men would have done so too. Yet the question always remains for the Court to interpret the reasonable meaning of the acts of the parties, by word or deed, and no characterization of its effect by either party thereafter, however truthful, is material. The rights and obligation depend upon the law alone.

When therefore Carse says what is the clear understanding of the legal effect of the practise, it is
1031 of no consequence, since that understanding was expressed only in acts, the natural meaning of which does not imply any trust relation, as he, and perhaps they, may have supposed. Had they said that they meant to create a trust, such a trust would arise, but when they merely adopted a course of conduct, the supposed results of that conduct are immaterial. I have therefore wholly disregarded this portion of Carse's testimony.

The question of subrogation is easily disposed of. There is no subrogation unless the money used to pay the claim kept alive by subrogation, was money on which the party subrogated had in equity some
1032 claim, charge or lien. I think there are no cases in which the payment of money in discharge of a claim allows of subrogation when the money was in all senses that of the man who paid the obligation. In other words, if the bank had some kind of equitable lien on the cheques in the hands of the broker, it would certainly be entitled to be subrogated, but not if those funds were the funds of the broker in every sense. It is of course true that in *Hurley* vs. *Atchison, Topeka and Santa Fe Railroad*, 213 U. S., 126, the Court went a long way to sustain the equity of a claimant in bankruptcy, but I think it quite clear that the reason was this:

the money which the road paid in advance for coal 1033
was the purchase price of an agreed quantity of coal, actually in existence. It was meant to give the road the right to demand from the seller a certain amount of coal in its possession which, though not yet set apart from the bulk, was still definable in quantity. That was a specific interest in a *res* which survived bankruptcy.

It hardly seems worth while to consider *Sexton* vs. *Kessler*, 172 Fed. R., 535, in which there was a specific agreement.

This case was heard in a somewhat anomalous way, as it was referred to take the testimony and report. The Master has reported and this is there- 1034
fore in the nature of a final hearing on the testimony. The learned Master allowed himself to be persuaded to incorporate certain refusals of requests to find, a practise which has, as far as I can learn, no place in equity practise and the very beginning of which I hope will always be resisted by the Federal courts which may otherwise find themselves in the unhappy predicament in that respect of the State Courts under the New York Code. I have wholly disregarded these findings and refusals to find. I have treated the testimony as though submitted on final hearings.

This suit is in equity to recover the actual securi- 1035
ties in specie; that is the prayer and that was what was intended. It is quite likely that the trustee may have had the right to sue at law after rescinding the transfer and making a demand, because the refusal would have been a conversion. However, he did nothing of the kind but proceeded in equity to reclaim the securities and he cannot now blow hot and cold. The decree will be for the delivery of the securities with any dividends received upon them. If the complainant wishes, he may take a reference on an accounting as to the responsibilty for the depreciation in value. I can-

1036 not decide such a matter upon affidavits though from the letters it looks as though the parties had substantially agreed that the bank should exercise its good judgment as to the sale of the securities. If so, the bank would under no circumstances be responsible for depreciation. If the trustee did not so consent, the question would arise whether or not the bank was a trustee *ex maleficio*, and, if so, whether it was responsible for any loss by depreciation regardless of whether it used due care. Those questions I will not consider until it appears whether the trustee did not assent to the bank's course.

1037 The trustee will, of course, recover costs. Should a reference be had, I should be glad to have Judge Brown again act as Master, if he is willing.

1038

Opinion of Hand, J., Granting Motion to Confirm Special Master's Report. 1039

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST *et al.*, Trustees in Bankruptcy, etc.,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF NEW YORK. 1040

DANIEL P. HAYS and RALPH WOLF, for the Complainant.

LEWIS H. FREEDMAN, for the Defendant.

HAND, *District Judge:*

My opinion in *Hotchkiss* vs. *National City Bank*, just handed down, controls as to the main issues and leaves very little for discussion here, especially in view of the full report of the Master. The proof of insolvency was much more than enough. The price of the Columbus and Hocking Coal and Iron Co. stock had already reached a price below the mark necessary to make the bankrupts insolvent, when the transfer occurred, and it never regained that price and has since almost altogether disappeared. The values which it had had prior to January 19th, 1910, I am satisfied as a matter of fact to have been the result of the existence of the pool. That the stock had any such value in such quanti- 1041

1042 ties as the bankrupts held it, seems a contention unworthy of any serious argument. As soon as it was sold in such quantities its value dropped, not because of a temporary flurry, but because upon an open market where it was not, in the slang of the brokers, "supported" constantly, it could not maintain a value even as high as its lowest figure of the nineteenth.

The exception to the admissibility of the books is not good. They were not put in evidence to prove the sale and delivery of any securities represented by any item contained in them, or the loan of any money, but to show whether the bankrupts
1043 were solvent or insolvent at a given time. If they were not admissible for that purpose, no one could be proved insolvent without proving separately every item of liability and every asset by common law proof. The law requires nothing of the sort, but allows anyone's books in evidence, even if not a privy, to show whether he is insolvent or solvent, upon proof that they are in fact his books, duly kept in his business, for the purpose of showing his financial condition, *Adams* vs. *Bowerman*, 109 N. Y., 83. The authorities cited by the defendant are all cases where the effort was to use the books to show that an item therein contained in fact rep-
1044 resented some transaction which was the basis of the action.

The last question is of the deposit of $54,048.08, received sometime about twelve o'clock from the bankrupts. The exact time when this was received cannot be fixed, except that it was after Roe left the bank and before he got back. Moreover it had left the bankrupt's place of business before Roe got there. As Roe left at between ten minutes before noon and noon, and as he got to the bankrupt's office in about five or ten minutes, it is almost certain that the deposit reached the bank about five minutes before noon, and, therefore, at a time

when the bankrupts were insolvent. The only re- 1045
maining question which can arise is, whether, when the bank received the money, they knew that the bankrupts were insolvent; because it is not necessary to prove that the bankrupts themselves meant to give any preference when they made the deposits. *Alexander* vs. *Redmond*, 180 Fed. R., 92. I agree with the Master that the bank never accepted the deposits as such at all, but as a payment of the firm's indebtedness. Roe says that he had at least temporarily closed the account and stopped any further withdrawals. Now a bank account certainly means that the depositor may draw, and if he has no right to draw, his deposit can be 1046
honestly received only as a payment of indebtedness already owing. Treating it, therefore, as a payment of the "clearance" loan *pro tanto*, was the bank's information at that time enough to make it a preference? Roe learned nothing from Sherwood, except insofar as by an evasive answer he corroborated his existing information. I do not mean that this added nothing to Roe's information, for reticence under the circumstances was nearly equivalent to an admission of the fact, but it does not follow that the information was not enough without such an admission. Consider the situation as a whole in the light of all the facts. The bank 1047
heard that there was a rumor that the bankrupts were in financial straits, which necessarily meant that they might be insolvent; until confirmation of the rumor could be made they had stopped the normal relations between themselves and the bankrupts, conduct which cannot possibly have meant anything else than that they feared the bankrupts' insolvency and meant to act as though it already existed till they should learn the facts; finally they sent an officer directly to the bankrupts to learn what he could, and to bring back everything he could get, which would secure the indebtedness.

1048 Really it seems to me, in face of such circumstances to contend that the bank did not apprehend that the bankrupts might be then insolvent, is beyond serious consideration. Of course, if an intent to receive a preference can exist only when the creditor has full knowledge of insolvency, then there was not the necessary intent here, but full knowledge is not necessary and practically never exists. As in other cases of notice, as, for example, commercial paper, all that is necessary is such knowledge as would put most men on inquiry, *Cooley* v. *McPherson*, 152 Fed. R., 951; *Stern* v. *Paper*, 183 Fed. R., 228. Here the knowledge did
1049 in fact stimulate inquiry, and the inquiry showed the rumor to be true. There could be no better case of intent, unless a confession of insolvency be necessary. Therefore, I agree with the Master that even if the deposits reached the bank before Roe spoke to Sherwood, the delivery was a preference under the act and was invalid. The proof of the custom in the case at bar is a little different from that in the case of *Hotchkiss* vs. *National City Bank*, in that Roe testifies to one instance in which a bank went to a customer and required him to put up collateral for a loan. The circumstances are too vague, however, to enable me to attach any
1050 effect to this testimony.

Let a decree pass as indicated by the Master, with costs.

Decree.

1051

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD J. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as co-partners, composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,

Complainants,

1052

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Defendant.

1053

This cause having duly come on for trial, and upon the defendant's motion having been duly referred by order made and entered herein, to Charles F. Brown, Esq., as Special Master for hearing, testimony and report, and the said Special Master having heard the testimony and proofs of the parties, and having filed his report thereon in the office of the Clerk of this Court on October 11, 1911, and the defendant having thereafter and on November 25, 1911, filed exceptions to the said report, and the complainants having moved this

Court for a decree confirming said report and overruling said exceptions, and giving the complainants judgment as recommended in the report of the Master.

Now, upon the bill of complaint and the answer of the defendant thereto, and upon the replication of the complainants to said answer, and upon the order of reference aforesaid, the report of the Special Master and the testimony and exhibits filed therewith, and defendant's exceptions thereto, and after hearing argument of counsel for the respective parties, and the Court having given due deliberation thereto and being fully advised in the premises, it is

ADJUDGED AND DECREED that the said report of the Master be, and the same hereby is in all respects confirmed; and it is further

ADJUDGED AND DECREED that the transfers and deliveries of the stocks, bonds, securities and moneys referred to in the complaint herein, by the bankrupts to the defendant on January 19, 1910, were and are unlawful preferences within the meaning of the Bankruptcy Act of 1898 and the amendments thereto, and void, and should and hereby are set aside; and it is further

ADJUDGED AND DECREED that Irving L. Ernst, Lindsay Russell and Harford J. Marshall, the complainants herein, as Trustees of the assets and effects of the aforesaid bankrupts, do have and recover judgment against defendant, The Mechanics & Metals National Bank of the City of New York, in the sum of $229,745.53, being the amount realized by said defendant from said stocks, bonds, securities and moneys, and that the complainants do also have and recover judgment against the said defendant for interest upon said sum of $229,-

745.53 at the lawful rate of six per cent. per annum, 1057
as follows: On the sum of $54,048.08 from January 19, 1910; on the sum of $156,027.67 from March 10, 1910; on the sum of $15,438.28 from March 11, 1910, and on $4,181.50 from March 15, 1910, amounting to the sum of $25,566.68, which, together with the said principal sum, aggregates the sum of $255,312.21, and that the complainants also recover the costs to be taxed by the Clerk of this Court, pursuant to the rules and practices of this Court, and that the complainants have execution therefor.

Judgment dated New York, January 8, 1912.

C. M. HOUGH, 1058
U. S. District Judge.

(Endorsed)—"U. S. District Court, S. D. of N. Y.—Filed Jan. 9, 1912."

1059

1060 **Petition for Appeal and Allowance.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. FISKE, *et al.*, and J. M. FISKE & COMPANY,
1061 Bankrupts,
Plaintiffs,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant.

The above-named defendant, The Mechanics and Metals National Bank of the City of New York, a corporation, conceiving itself aggrieved by the judg-
1062 ment or decree made and entered in the above-entitled cause on the 9th day of January, 1912, does hereby appeal from said judgment or decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And the said The Mechanics and Metals National Bank of the City of New York, a corporation, prays that it be allowed this appeal, and that a transcript of the record, papers and proceedings upon which said judgment or decree was made, duly authen-

ticated, may be sent to the United States Circuit 1063
Court of Appeals for the Second Circuit.

JOLINE, LARKIN & RATHBONE,
Solicitors for defendant, The Mechanics and Metals National Bank of the City of New York, a corporation.

Appeal allowed.

February 1, 1912.

C. M. HOUGH,
D. J.

(Endorsed)—"U. S. District Court, S. D. of N. 1064
Y.—Filed Feb. 1, 1912."

1066 **Assignment of Errors.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. FISKE *et al.* and J. M. FISKE & COMPANY, Bankrupts,

1067 Plaintiffs,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Defendant.

In Equity.
Assignment of Errors.

Now comes the defendant, The Mechanics and Metals National Bank of the City of New York, and files the following assignment of errors upon which it will rely on its appeal from the judgment
1068 or decree in equity entered herein on the 9th day of January, 1912:

FIRST.—That the District Court of the United States for the Southern District of New York erred in overruling each and all of the respective exceptions filed herein by the defendant The Mechanics and Metals National Bank of the City of New York to the report herein of said Charles F. Brown, Special Master, and in confirming said report.

SECOND.—That the said Court erred in granting judgment to the complainants as prayed for in their bill of complaint.

THIRD.—That said Court erred in not dismissing 1069
the bill of complaint.

FOURTH.—That said Court erred in adjudging and decreeing that the transfers and deliveries of the stocks, bonds, securities and moneys referred to in the complaint herein by the bankrupts, J. M. Fiske & Company, to the defendant, The Mechanics and Metals National Bank of the City of New York, on January 19th, 1910, were and are unlawful preferences within the meaning of the Bankruptcy Act of 1898 and the amendments thereto, and are void, and setting aside the said transfers and deliveries.

1070

FIFTH.—That said Court erred in adjudging and decreeing that Irving L. Ernst, Lindsay Russell and Harford T. Marshall, the complainants herein, as Trustees of the assets and effects of the aforesaid bankrupts, have and recover judgment against the defendant, The Mechanics and Metals National Bank of the City of New York, in the sum of $229,745.53, being the amount realized by said defendant from said stocks, bonds, securities and moneys, and that the complainants also have and recover judgment against the said defendant, The Mechanics and Metals National Bank of the City of New York, for interest upon the said sum 1071
of $229,745.53 at the lawful rate of six per centum per annum, as follows, to wit: On the sum of $54,048.08 from January 19th, 1910; on the sum of $156,027.67 from March 10th, 1910; on the sum of $15,438.28 from March 11th, 1910, and on the sum of $4,181.50 from March 15th, 1910, amounting to the sum of $25,566.68, which, together with said principal sum, aggregates the sum of $225,312.21, and that the complainants also recover the costs to be taxed by the Clerk of the Court pursuant to the rules and practices of the Court, and directing that the complainants have execution therefor.

1072 SIXTH.—That said Court erred in not holding and deciding that there was no competent proof as to the financial status of the said firm of J. M. Fiske & Company, nor of the individual members thereof at the time of the delivery of said securities and cash to Mr. Roe, the representative of the defendant, by Mr. Sherwood, a member of the said firm of J. M. Fiske & Company, and that the aggregate amount of the property of said firm, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay creditors, were of a fair valuation
1073 sufficient in amount to pay its debts.

SEVENTH.—That said Court erred in holding and deciding that when the defendant, The Mechanics and Metals National Bank of the City of New York, received the cash and securities on the 19th day of January, 1910, it had reasonable cause to believe that the said firm of J. M. Fiske & Co. and the individual members thereof were insolvent, and that the effect of the transfer of the said property to the defendant would be to enable it to obtain a greater percentage of its debt than other creditors of the same class.

1074 EIGHTH.—That said Court erred in not holding and deciding that at the time of the receipt of said securities and cash, the defendant had not reasonable cause to believe that the said firm of J. M. Fiske & Co., and the individual members thereof, were insolvent, and that said defendant had not reasonable cause to believe that it was intended by said firm in the delivery of said securities to give to said defendant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

NINTH.—That the said Court erred in not hold- 1075
ing and deciding that the defendant, The Mechanics and Metals National Bank of the City of New York, had an equitable lien or claim or right on or in the property and securities mentioned in the bill of complaint and received by it on the 19th day of January, 1910, which was valid against the complainants as Trustees in bankruptcy.

TENTH.—That said Court erred in not holding and deciding that the delivery of the physical possession of the property and securities received by the defendant, The Mechanics and Metals National Bank of the City of New York, on the 19th day of 1076
January, 1910, from the bankrupts, J. M. Fiske & Co., was in accordance with the valid contract made at a time prior to four months before the filing of the petition in bankruptcy against the bankrupts, and in not finding that said contract was valid and effective against the complainants as Trustees of said bankrupts.

ELEVENTH.—That said Court erred in holding and deciding that the bankrupts did not make any particular property or fund security for the debt or obligation by virtue of which the defendant, The Mechanics and Metals National Bank of the City 1077
of New York, seeks to hold the property and securities received by it on the 19th day of January, 1910, mentioned in the bill of complaint and in said decree, and in holding and deciding that the bankrupts did not agree to keep on hand particular specified property, or the proceeds thereof, as security for the debt due to the defendant, The Mechanics and Metals National Bank of the City of New York.

TWELFTH.—That said Court erred in holding and deciding that the agreement and contract between

1078 the bankrupts and the defendant, and the course of conduct of the parties thereunder, and the custom of the financial district as appears in the record, did not create an equitable lien or claim or right in favor of the defendant, The Mechanics and Metals National Bank of the City of New York, on the property and securities received by it on the 19th day of January, 1910, valid and effective against complainants as Trustees in bankruptcy aforesaid.

THIRTEENTH.—That said Court erred in not holding and deciding that there was prior to the four months next preceding the filing of the petition
1079 in bankruptcy, a certain *bona fide* agreement by the said bankrupts with the defendant, The Mechanics and Metals National Bank of the City of New York, to hold specific property or the proceeds thereof, amounting to an equitable lien, claim or right valid against the complainants as Trustees in bankruptcy.

FOURTEENTH.—That said Court erred in not holding and deciding that there was an express agreement between J. M. Fiske & Co., the bankrupts, and the defendant, The Mechanics and Metals National Bank of the City of New York, made prior to four months next preceding the filing
1080 of the petition in bankruptcy against the said bankrupts pursuant to which J. M. Fiske & Co. agreed to make the particular property received by said firm on the 19th day of January, 1910, a security for the debt or other obligation of said firm to the defendant, The Mechanics and Metals National Bank of the City of New York, enforceable against the complainants as Trustees in bankruptcy of said bankrupts.

FIFTEENTH.—That said Court erred in not holding and deciding that the defendant, The Mechanics and Metals National Bank of the City of New

York, had a right, title and interest in or to the 1081
property and securities received by it from J. M. Fiske & Co. on the 19th day of January, 1910, and existing before the receipt of said property on said date, not in contravention of the Bankruptcy Act nor destroyed by the adjudication in bankruptcy of said bankrupts and valid as against the complainants as Trustees in bankruptcy.

SIXTEENTH.—That said Court erred in holding and deciding that the agreement between the said bankrupts and the defendant, The Mechanics and Metals National Bank of the City of New York, as shown in the record in relation to the property and 1082
securities received by the defendant, The Mechanics and Metals National Bank of the City of New York, on the 19th day of January, 1910, did not confer upon the said defendant the right to reduce the said property and securities to possession.

SEVENTEENTH.—That said Court erred in holding and deciding that equity will not enforce as against the complainants as Trustees in bankruptcy the agreement disclosed by the record between the bankrupts aforesaid and the defendant, The Mechanics and Metals National Bank of the City of New York.

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EIGHTEENTH.—That said Court erred in not holding and deciding that the legal or equitable title in the securities and property received by the defendant, The Mechanics and Metals National Bank of the City of New York, on the 19th day of January, 1910, passed to the said defendant prior to the filing of the petition in bankruptcy against the said bankrupts, and that there is no express law invalidating the transfer on the facts disclosed in the record.

1084 NINETEENTH.—That said Court erred in holding and deciding that the common stock of the Columbus and Hocking Coal and Iron Company, on the 19th day of January, 1910, did not have any substantial value, and that its price on the New York Stock Exchange was maintained by a pool organized to inflate it.

TWENTIETH.—That said Court erred in holding and deciding that the books of J. M. Fiske & Co. were admissible as competent, material and relevant evidence to prove the insolvency of said firm.

1085 TWENTY-FIRST.—That said Court erred in holding and deciding that the said books had been properly proved.

TWENTY-SECOND.—That said Court erred in holding and deciding that the cancelling of the day loan and Mr. Roe's instructions to the clerks of the defendant not to pay or certify any more checks for the account of J. M. Fiske & Co., and the closing and balancing of said account of said firm with said bank, was sufficient to cause Mr. Roe to believe that the firm was unable to pay its debts.

TWENTY-THIRD.—That said Court erred in not
1086 finding and deciding that said steps, and each of them, were merely precautionary and pursuant to the terms of an agreement existing between the parties, and that that was no ground to cause Mr. Roe to believe that said firm of J. M. Fiske & Co. and the individual members thereof were as a matter of fact unable to pay their debts.

TWENTY-FOURTH.—That said Court erred in holding and deciding that the information received by the defendant, The Mechanics and Metals National Bank of the City of New York, through Mr. Roe was sufficient in law to have led an ordinary pru-

dent business man to an inquiry of the firm of J. M. 1087
Fiske & Co.'s financial condition, and that said inquiry would have revealed the insolvent condition of said firm.

TWENTY-FIFTH.—That said Court erred in not holding and deciding that the information which Mr. Roe received was not sufficient in law to lead an ordinary prudent business man to an inquiry of the firm of J. M. Fiske & Co.'s financial condition.

TWENTY-SIXTH.—That said Court erred in holding and deciding that, under the circumstances revealed by the record, Mr. Roe, as agent of the de- 1088
fendant Bank, was bound to make inquiries of Mr. Sherwood or Mr. Humphreys when at the office of J. M. Fiske & Co. as to the firm's financial condition, and that had he made such inquiries he would undoubtedly have been informed as to its financial condition.

TWENTY-SEVENTH.—That said Court erred in not holding and deciding that there was no duty upon Mr. Roe, under the circumstances, to make inquiries of Messrs. Sherwood or Humphreys as to the financial condition of the firm of J. M. Fiske & Co.

TWENTY-EIGHTH.—That said Court erred in hold- 1089
ing and deciding that the defendant must be deemed to have such knowledge as Mr. Roe would have obtained if he had made inquiry as to the financial condition of the firm of J. M. Fiske & Co.

TWENTY-NINTH.—That said Court erred in not holding and deciding that the defendant must not be deemed to have had such knowledge sufficient to fasten upon it a reasonable cause to believe that said firm of J. M. Fiske & Co. was in fact bankrupt at the time of the delivery by it of said prop-

1090 erty on the 19th day of January, 1910, and in not finding that the record did not reveal that had such inquiry been made Mr. Roe would have, as a matter of fact, obtained information as to the true financial status of said firm of J. M. Fiske & Co.

THIRTIETH.—That said Court erred in holding and deciding that the defendant must have had knowledge that the firm of J. M. Fiske & Co. was insolvent, and having such knowledge to have had reasonable cause to believe that the effect of the transfer would have been to enable it to obtain a greater percentage of its debt than any other cred-
1091 itor of the same class.

THIRTY-FIRST.—That said Court erred in not holding and deciding that the said defendant had no knowledge through which it would have had reasonable cause to believe that said firm was insolvent and that by receiving such property it would have reasonable cause to believe that the effect of the transfer would have been to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

THIRTY-SECOND.—That the said Court erred in
1092 holding and deciding that the defendant, The Mechanics and Metals National Bank of the City of New York, is among a general class of creditors of the bankrupts whose claims aggregate upwards of a million dollars.

THIRTY-THIRD.—That said Court erred in not holding and deciding that the defendant is not a general creditor and that there is no other creditor of said firm of J. M. Fiske & Co. or of the partners thereof of the same class as the defendant.

THIRTY-FOURTH.—That said Court erred in hold- 1093
ing and deciding that a condition did not exist out of which any custom or usage could arise.

THIRTY-FIFTH.—That said Court erred in not holding and deciding that the record revealed the existence of conditions out of which a custom or usage could arise, and that the facts were that the custom or usage as set forth in the record did in fact exist.

THIRTY-SIXTH.—That said Court erred in holding and deciding that considering the purposes for which day loans are made by banks to Stock Ex- 1094
change brokers, that no such custom could exist.

THIRTY-SEVENTH.—That said Court erred in not holding and deciding that the facts as shown revealed that said day loans made between banks and Stock Exchange brokers were governed by said custom as shown by the record and that the same did exist as a matter of fact.

THIRTY-EIGHTH.—That said Court erred in holding and deciding that the result of the day's transactions leads to the payment of the day loans and not to their security, and such is the understanding 1095
and intent of both borrower and lender.

THIRTY-NINTH.—That said Court erred in not holding and deciding that the intent of both borrower and lender is to secure said day loans at the time when they are made, and that the same shall remain secured at all times until paid, and that the lender shall from the time the loan is made have a lien or claim upon or interest in said funds and the avails thereof no matter what form they shall take, until the payment and discharge of said day loans.

1096 FORTIETH.—That said Court erred in holding and deciding that no custom or usage was shown to exist between banks in the City of New York and Stock Exchange brokers in reference to the method of paying the unpaid balance of said day loans.

FORTY-FIRST.—That said Court erred in not holding and deciding that a custom or usage does exist between banks in the City of New York and Stock Exchange brokers in reference to the method of paying the unpaid balance of said day loans.

1097 FORTY-SECOND.—That said Court erred in holding and deciding that the defendant, The Mechanics and Metals National Bank of the City of New York, had no lien or right upon or claim in or to the property and securities in question, and that at the time of the delivery thereof to its agents it had no pre-existing right to a lien or right thereon or claim therein or thereto.

FORTY-THIRD.—That said Court erred in holding and deciding that the defendant is not entitled to retain the sum of $54,048.08, constituting the deposit made by the said firm of J. M. Fiske & Co. on
1098 the 19th day of January, 1910.

FORTY-FOURTH.—That said Court erred in not holding and deciding that the defendant, The Mechanics and Metals National Bank of the City of New York, was entitled to retain the sum of $54,048.08 constituting the deposit made by the said firm of J. M. Fiske & Co. in the course of business on the 19th day of January, 1910.

FORTY-FIFTH.—That said Court erred in holding and deciding that the defendant, The Mechanics and Metals National Bank of the City of New

York, never received or held the said sum of $54,- 1099
048.08 as a deposit, or held the same as a banker, and that the said firm of J. M. Fiske & Co. never had a right to draw against said sum.

FORTY-SIXTH.—That said Court erred in not holding and deciding that the said defendant did receive the said sum of $54,048.08 as a deposit in bank, and that the right of said firm of J. M. Fiske & Co. to draw against the same was absolute until the time of the failure of the said firm subsequent to said deposit and the application of the same to the indebtedness of J. M. Fiske & Co. pursuant to its agreement with said defendant.

1100

FORTY-SEVENTH.—That said Court erred in holding and deciding that the deposit of $54,048.08 was made when the said firm of J. M. Fiske & Co., and the individual members thereof, were insolvent, and applied by the defendant to the payment of the indebtedness to the defendant by said firm of J. M. Fiske & Co. when said defendant had reasonable cause to believe that it was intended by said firm in making said deposit to give to said defendant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

1101

FORTY-EIGHTH.—That said Court erred in not holding and deciding that said firm of J. M. Fiske & Co. was solvent and that said sum of $54,048.08 was received by said defendant as a deposit and was not applied by said defendant to the payment of said indebtedness of said firm of J. M. Fiske & Co. to the defendant until subsequent to the time of the deposit when the same was, pursuant to the terms of the agreement existing between the parties, set off against the indebtedness of the said firm of J. M. Fiske & Co. to the defendant, and that

1102 said setoff was legal and in accordance with the rights of the defendant pursuant to the terms of the Bankruptcy Act.

FORTY-NINTH.—That said Court erred in holding and deciding that the said defendant treated the said deposit of $54,048.08 as a payment of the firm's indebtedness.

FIFTIETH.—That said Court erred in not holding and deciding that said sum of $54,048.08 was received as a deposit on account of said firm's banking account with the defendant, and was set off
1103 against the said indebtedness subsequent to the deposit thereof.

FIFTY-FIRST.—That said Court erred in holding and deciding that the deposit of said sum of $54,048.08 constituted a preference as defined in Section 60 of the Bankruptcy Act and that the transfer thereof is voidable by the plaintiffs, and they are entitled to set the sum aside in accordance with the prayer of the complaint.

FIFTY-SECOND.—That said Court erred in holding and deciding that the complainant was entitled to recover any costs herein against the defendant,
1104 The Mechanics and Metals National Bank of the City of New York.

WHEREFORE, the defendant, The Mechanics and Metals National Bank of the City of New York, prays that the decree may be reversed and that said Court may be directed to dismiss the bill of complaint herein, together with costs.

JOLINE, LARKIN & RATHBONE,
Solicitors for Defendant.

(Endorsed)—"U. S. District Court, S. D. of N. Y.—Filed Feb. 1, 1912."

Order Allowing Appeal.

1105

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. FISKE *et al.*, and J. M. FISKE & COMPANY, Bankrupts,

Plaintiffs,

AGAINST

1106

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Defendant.

The defendant The Mechanics and Metals National Bank of the City of New York, a corporation, having heretofore filed herein its petition for an appeal, and having duly filed herwith an assignment of errors, it is

ORDERED, that said appeal shall operate as a supersedeas of the judgment or decree herein of 1107
January 9th, 1912, and a stay of execution of said judgment or decree pending said appeal, upon the execution of a bond in the penalty of Two hundred and fifty thousand eight hundred seventeen and 50/100 Dollars. The undertaking of The Mechanics and Metals National Bank of the City of New York without surety is now approved.

Dated February 1, 1912.

C. M. HOUGH,

D. J.

(Endorsed)—"U. S. District Court, S. D. of N. Y.—Filed Feb. 1, 1912."

1108 **Undertaking on Appeal.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. FISKE *et al.*, and J. M. FISKE & COMPANY,
1109 Bankrupts,
Plaintiffs,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that The Mechanics and Metals National Bank of the City of New York is held and firmly bound unto the
1110 above-named plaintiffs, Irving L. Ernst, Lindsay Russell and Harford T. Marshall as Trustees in Bankruptcy of Arthur C. Sherwood, Dudley T. Humphrey, Clifford M. Washburn and Josiah M. Fiske individually and as copartners composing the firm of J. M. Fiske & Company, and the firm of J. M. Fiske & Company, in the sum of Two hundred and fifty-six thousand one hundred fifty-three and 29/100 dollars, to be paid to the plaintiffs, for the payment of which, well and truly to be made, said The Mechanics and Metals National Bank of the City of New York binds itself, its successors and assigns firmly by these presents.

Sealed with its seal and dated the 26th day of 1111
January in the year of our Lord One thousand nine hundred and twelve.

WHEREAS, the above named The Mechanics and Metals National Bank of the City of New York has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Judicial Circuit, to reverse the decree rendered in the above-entitled suit by the Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, on January 9th, 1912;

NOW, THEREFORE, the condition of this obligation 1112
is such that if the above-named The Mechanics and Metals National Bank of the City of New York shall prosecute the said appeal to effect and insure all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed and Delivered, Taken and Acknowledged this 26th day of January, 1912.

THE MECHANICS AND METALS NATIONAL
BANK OF THE CITY OF NEW YORK.
By G. W. MCGARRAH, 1113
President.

Attest:
JOS. S. HOUSE,
Cashier.

[L. S.]

STATE OF NEW YORK,
County of New York, } ss.:

On this 26th day of January, 1912, before me personally appeared Gates W. McGarrah, President of The Mechanics and Metals National Bank of the

City of New York, to me known, who being by me duly sworn did depose and say that he resides in the Borough of Manhattan, City, County and State of New York; that he is the President of The Mechanics and Metals National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law.

And the said Gates W. McGarrah further says that he is acquainted with Joseph S. House, and knows him to be the Cashier of said corporation; that the signature of said Joseph S. House subscribed to the said instrument is the genuine handwriting of the said Joseph S. House and was thereto subscribed by the like order of the said Board of Directors and in the presence of him the said Gates W. McGarrah, President.

ARTHUR W. McKAY,
[NOTARIAL SEAL.] Notary Public Kings Co.
Ctf. filed in N. Y. County.

Approved as to form and sufficiency of security.

HAYS, HERSHFIELD & WOLF,
Attorneys for Trustees in Bankruptcy.

(Endorsed)—"Approved N. Y., Feby. 1, 1912.—C. M. Hough, *D. J.*"

(Endorsed)—"U. S. District Court, S. D. of N. Y.—Filed Feb. 1, 1912."

Citation.

1117

DISTRICT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. FISKE, *et al.*, and J. M. FISKE & COMPANY, Bankrupts,

Plaintiffs,

1118

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Defendant.

United States of America, ss.:

To IRVING L. ERNST, LINDSAY RUSSELL AND HARFORD T. MARSHALL, AS TRUSTEES IN BANKRUPTCY OF DUDLEY T. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE AND ARTHUR C. SHERWOOD, INDIVIDUALLY AND AS COPARTNERS COMPOSING THE FIRM OF J. M. FISKE & COMPANY, AND THE FIRM OF J. M. FISKE & COMPANY. 1119

YOU ARE HEREBY cited and admonished to be and appear before the United States Circuit Court of Appeals of the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 1st day of March, 1912, pursuant to an appeal

1120 filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, in equity, wherein The Mechanics and Metals National Bank of the City of New York is defendant-appellant, and you are complainants-appellees, to show cause, if any there be, why the judgment or decree in said appeal mentioned should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

GIVEN under my hand at the Court House in the Borough of Manhattan, City of New York, Southern District of New York, this 1st day of Febru-
1121 ary, in the year of our Lord One thousand nine hundred and twelve, and of the Independence of the United States One hundred and thirty-sixth.

C. M. HOUGH.
District Judge of the United States for the Southern District of New York.

(Endorsed)—"Service of a copy of the within citation on appeal is admitted this 1st day of Feb., 1912.—Hays, Hershfield & Wolf, Attys. for Plffs.-Respdts."

(Endorsed)—"U. S. District Court, S. D. of N.
1122 Y. Filed Feb. 2, 1912."

Plaintiffs' Exhibit 1.

1123

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF A. T. LINDLEY *et al.*, to have Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners composing the firm of J. M. Fiske & Company, and the firm of J. M. Fiske & Company adjudged involuntary bankrupts.	In Bankruptcy.

1124

At New York City, in said District, on the 12th day of March, A. D. 1910, before the Honorable Charles M. Hough, Judge of the said Court in Bankruptcy, the petition of A. T. Lindley *et al.*, that Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners composing the firm of J. M. Fiske & Co., and the firm of J. M. Fiske & Co. be adjudged involuntary bankrupts, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, it appearing that the subpœnas, to-

1125

1126 gether with the petition, were duly served upon the alleged bankrupts, and upon the appended consent to the entry of this order, and the withdrawal of the answer, the said Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners, composing the firm of J. M. Fiske & Co., and the firm of J. M. Fiske & Co. are hereby declared and adjudged bankrupts accordingly.

AND IT IS FURTHER ORDERED that the said bankrupts file schedules in triplicate as required by law within ten days from the date hereof.

1127

AND IT IS FURTHER ORDERED that the said matter be referred to Seaman Miller, Esq., one of the referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupts shall attend before said referee on the 18th day of March, 1910, at 10 o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court re-
1128 lating to their said bankruptcy.

WITNESS, the Honorable Charles M. Hough, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 8th day of March, A. D. 1910.

C. M. HOUGH,
District Judge.

THOMAS ALEXANDER,
Clerk.

I, THOMAS ALEXANDER, Clerk of the District 1129
Court of the United States for the Southern District of New York, do hereby certify that the above is a true copy of an order made in the above-entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 13th day of September, in the year of our Lord one thousand nine hundred and ten, and of the independence of the said United States the one hundred and thirty-fifth.

THOS. ALEXANDER, 1130
[SEAL.] Clerk.

1131

1132 **Plaintiffs' Exhibit 2.**

At a Court of Bankruptcy held in and for the Southern District of New York, in the City, County and State of New York, on the 7th day of May, 1910.

Before SEAMAN MILLER, Referee in Bankruptcy in the District Court of the United States for the Southern District of New York.

1133 IN THE MATTER OF

DUDLEY T. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, copartners doing business under the firm name and style of J. M. Fiske and Company.

In Bankruptcy, No. 13,213.

1134 It appearing to the Court that Lindsay Russell, Irving L. Ernst and Harford T. Marshall, of the City, County and State of New York, and in said District, have been duly appointed trustees of the estate of the above-named bankrupt, and has given bond with sureties for the faithful performance of his official duties in the amount fixed by the creditors, to wit, in the sum of fifty thousand dollars,

IT IS ORDERED that the said bond be and the same is hereby approved.

SEAMAN MILLER,
Referee in Bankruptcy.

Plaintiffs' Exhibit 3.

1135

J. M. FISKE & Co.
Bankers and Brokers,
Members New York Stock Exchange,
42 Broadway, New York.
SECRETARY, NEW YORK STOCK EXCHANGE.

DEAR SIR:

We regret to announce that we are unable to meet our obligations.

Yours truly,
J. M. FISKE & Co.

1136

January 19, 1910.

In pencil is written:

"Received 12.40.
G. W. E."

Plaintiffs' Exhibit 4.

NEW YORK, January 19, 1910.

1137

MECHANICS NATIONAL BANK,
New York City.

Please loan us today $400,000. Crediting this amount to our account and oblige.

J. M. FISKE & COMPANY.

1138 **Plaintiffs' Exhibit 5.**

No. 59519.

NEW YORK, January 18, 1910.

MECHANICS NATIONAL BANK.

Pay to the order of Mechanics National Bank, Five hundred thousand dollars.

J. M. FISKE & COMPANY.

$500,000.

Stamped on the back is "Mechanics National Bank. Paid January 18th, 1910."

1139 Also stamped by perforation is the word "Paid."

Plaintiffs' Exhibit 5A.

No. 59141.

NEW YORK, January 7, 1910.

MECHANICS NATIONAL BANK.

Pay to the order of Mechanics National Bank Four hundred thousand dollars.

J. M. FISKE & COMPANY.

1140 $400,000.

Plaintiffs' Exhibit 6.

1141

$20,000. Wabash 1st Rfdg. 4s	Nos. 9810 20744 22875 28854		14,879.45	
	12034 20746 22876 30931			
	16468 20748 22877 30932			
	16469 22869 28852 30933			
	16470 22871 28853 30934			
10 shares Inter-Met. Com.	No. T3516		224.80	
100 shares North American	38054		7,998.00	
900 shares Mo. Kan. & Tex	No. AO112420— 10 shs		39,619.50	
	BO19273— 20 "			
	BO19040— 20 "			
	BO18760— 50 "			
	028002—100 "			
	025171—100 "			
	027663—100 "			
	026575—100 "			
	025464—100 "			1142
	026603—100 "			
	026429—100 "			
	026820—100 "			
100 shares Kerr Lake Mining	No. 2300		868.50	
200 " Utah Copper	11973-12038		10,375.60	
400 " Col. & Hocking Coal & Iron	No. 4586, 4751, 5521, 5558		5,917.00	
100 " Chic. Union Traction (Cert. of Deposit)	No. A1958		385.50	
100 " Northern Pacific	No. C39882— 50 shs.		13,848.00	
	C40058— 50 "			
400 " Great Northern Pfd.	No. A79668— 50 shs.		55,742.00	
	A80851— 50 "			
	69460—100 "			
	67271—100 "			
	67272—100 "			
200 " U. S. Steel Com.	No. G324921-324922		17,621.00	
100 " Amer. Car & Foundry	No. 33869		6,760.50	1143
10 shares Sloss Sheffield Steel & Iron	No. B7244		813.55	
10 " Chicago & Alton	No. A1387		601.05	
			$175,647.45	

Trustee.

List of Securities del'd. to
Mr. Rowe at office of J. M. Fiske & Co.
Jan. 19th, 1910.

1144 **Plaintiffs' Exhibit 7.**

STOCK ON HAND.

	Cert.		*No. Shares*
	2953	American Bicycle Co.....	100
	312	Atlas Manhattan Mining Co.	500
	886	" " " "	1000
	612	" " " "	1000
	4084	American Malt Corporation	10
	c 3662	" Hide & Leather Co. ..	100
	b 6065	" " " " ..	5
1145	d 5923	Allis Chalmers Co.	30
	c 505	Bovard Cons. Mines Co.	100
	a 1826	Braden Copper Co.	10
	975	Butte Copper Co.	100
	976	" " "	100
	977	" " "	100
	978	" " "	100
	979	" " "	100
	20448	Boston Consolidated Copper & Mining Co.	20
	4936	Columbus & Hocking Coal & Iron Co.	100
	20465	Boston Con. Copper & Mining Co.	30
1146	19124	" " " " "	5
	19011	" " " " "	15
	17917	" " " " "	30
	629	Consolidated S. S. Co.	100
	439	Con. Ariz. Smelting Co., Scrip..	50
	a 61819	Cobalt Central Mines Co.	100
	a 59689	" " " "	100
	a 59688	" " " "	100
	a 59687	" " " "	100
	7364	Cobalt Silver Queen Lim't	53
	7543	Comstock Tunnel Co.	100
	24080	" " "	100
	1455	Coniages Mines Lim't	25

Cert.		*No. Shares*	
a 269	Colonial Silver Mines Co.	50	1147
1962	" " " "	100	
1961	" " " "	100	
A 2026	Chicago Union Traction Co. certificate of deposit with Central Trust Co. of N. Y.	100	
d 687	Chicago Union Traction Co. certificate of deposit with Central Trust Co. of N. Y.	10	
d 671	Chicago Union Traction Co. certificate of deposit with Central Trust Co. of N. Y.	10	
n. s. 2444	Chicago Subway Co.	20	
688	Chicago Great Western R. R. ...	7	1148
a 2065	Elm Central Copper Co.	10	
21804	Furnace Creek Copper Co.	100	
65378	Goldfield Daisy Mining Co.	100	
15379	" " " "	100	
15380	" " " "	100	
15381	" " " "	100	
13347	" " " "	100	
5191	Golden Anchor Mining Co.	100	
2	Indian Valley Cons. Mine Co. ...	100	
5845	Iowa Central R. R. Prfd.	10	
b 7806	International Paper Co.	10	
v 387	" Mercantile Marine..	20	
o 2016	Kerr Lake Mining Co.	50	1149
c 5462	Manhattan Transit Co.	100	
c 3925	" " "	100	
c 8624	" " "	100	
c 8868	" " "	100	
c 6503	" " "	100	
c 4221	" " "	100	
25158	Norfolk & Western R. R.	3	
25159	" " "	2	
a 45992	Nipissing Mines Co.	10	
y 6887	Nevada Cons. Copper Co.	30	
b 21977	" Utah Mines & Smelters .	20	

	Cert.		No. Shares
1150	a 151	Ontario Silver Mining Co.	50
	11697	" " " "	100
		Produce Exchange Membership..	1
	974	Pan Silver Mining Co.	500
	d 06543	Pittsburg Coal Co.	10
	143	Pennsylvania R. R. Warrants ..	25
	a 1656	Quicksilver Mining Co.	20
	F 1417	South Utah Mines Smelter	10
	a 5483	Standard Rope & Twine	5
	a 5505	" " "	20
	P 5296	St. Louis & San Francisco R. R...	1
	F 5304	" " " ..	25
1151	F 5305	" " " ..	4
	G 4626	" " " ..	10
	G 4627	" " " ..	10
	11811	Tonopah Extension Mining Co. ..	50
	a 1084	Vulcan Detinning Co.	10
	84	Vigori Leather Company	500
	b 3985	Wheeling & Lake Erie R. R.	10
	b 3947	" " " "	10
	d 7660	Yukon Gold Company	50
	b 15160	Northern Securities Co.	1
		18 Certificates of Phœnix Gold Mining Co., 100 shares each.	1800
1152		24 certificates of 10,000 shares Ed. Johnresburgh	240000
		22 certificates of 5,000 shares Gold Mining Co.	120000
		1 certificate of 250,000 shares of Gold Mining Co.	250000
		1 certificate	114193
	936	Moquin Copper Company	1000
	951	" " "	1500
	898	" " "	300
	822	" " "	100
	306	Moquin Copper Company	600
	5744	Golden Anchor Mining Co.	500
	5745	" " " "	500

Cert.		*No. Shares*	
			1153
22	Rockaway Valley Ice Co.	10	
155	" " " "	25	
1630	Consolidated S. S. Company	100	
4482	" " "	100	
223	Belcher Mountain Copper Co. ..	1000	
18	" " " " ..	900	
21	Columbian National Oil & Gas Co.	120	
27	" " " " "	40	
68	Golden Fruit Company	100	
69	" " "	100	
70	" " "	100	
71	" " "	100	
72	" " "	100	1154
59	" " "	50	
80	" " "	50	
87	" " "	50	
77	" " "	10	
78	" " "	10	
105	1st mortgage 6% Gold Bond $100 Cedar Lake Park due Jan 15 1918		
106	1st mortgage 6% Gold Bond $100 Cedar Lake Park due Jan 15 1918		
38	Rockaway Valley Ice Co.	40	
32	" " " "	10	1155
150	Rockaway Valley Ice Co.	75	
	Deed of certain property containing 16,100 square feet of land in township of Rockaway, Morris County, New Jersey, for the Rockaway Ice Co. to Arthur C. Sherwood		
102	1st mortgage 6% Gold Bonds 100		
103	Cedar Lake Park due Jan. 15th, 1918		
104	" " " " " "		
86	Morris County Golf Club.....		

1156	*Cert.*		*No. Shares*
	62	Egypt Mills Club 6% Mort. Bond	$100
	63	" " " due 1933	"
	64	" " " " "	
	64429	$20.00 U. S. Gold Bond 3% due 1918 (all coupons attached)	
	818	Olema Oil Co.	1000
	29	Water Auto Co. of N. J.....	50
	4	" " " "	30
	65	Egypt Mills Club	1
	21	Meatox Company, common	50
	25	" " preferred	50
	151	St. Nicholas Skating & Ice Co. ..	5
1157	274	" " " " ...	5
	298	" " " " ...	10
	299	" " " " ...	5
	300	" " " " ...	5
	305	" " " " ...	10
	B. 14693	Northern Securities Co.	1
	17	Globe Mining Development Co. ..	30
	D.030282	Granby Cons. Mining Smelting & P. Co.	3
	156	Sherman Bank	10
		Deed to lots 51-52-53 at Cedar Lake Park, N. J., containing 27,900 square feet of ground.	
1158		Policy No. 249,756 Aetna Life Ins. Co.	
		Policy No. 192,152 Aetna Life Ins. Co.	
		Policy No. 249,758 Aetna Life Ins. Co.	
		Policy No. 249,759 Aetna Life Ins. Co.	
		4 Policies on life of J. M. Fiske in Aetna Life Ins. Co.	

J. M. FISKE & CO., "BANKRUPTS".

LIST OF ACCOUNTS RECEIVABLE.

Name	Address		Amount	
Geo. S. Andes	42 Broadway, N. Y. C.		948.76	
Frederick Basch	Unknown		3.66	
Joel C. Bolden	241 East 51st St., N. Y. C.		.75	
Miss Grace M. Brown	415 Lexington Ave., N. Y. C.		24.47	
B. Brooks	71 Broadway, N. Y. C.		577.73	Note $556.19
W. Chandler, Jr.	St. Denis Hotel		25.00	Balance on note of $150.00
B. F. Cogswell, #50 A/c	259 North Main St., Freeport, L. I.		400.89	
Alex Conreid "Note"	1229 Park Ave., N. Y. C.		1,558.65	
Mrs. Bertha DeKraft	148 West 70th Street, N. Y. C.		163.43	
Samuel J. Dennis	1135 Madison Ave., N. Y. C.		1.99	
J. G. Dettmer, "Special"	c/o Peoples' Trust Co., 181 Montague St., Brooklyn, N. Y.	6,463.14		Including Note of $2,500.00
J. G. Dettmer, #16 "Special"	" " " " " " " " " "	287.13		
J. G. Dettmer, #16	" " " " " " " " " "	15,315.83		
P. S. Duryea	89 Front Street, N. Y. C.		22,066.10	
B. F. Ellis	York Harbor, Maine		2,586.30	
John Felix, "Stock"	149 East 21st St., N. Y. C.		153.50	
John Felix (Special) "Stock"	" " " " "	13,794.37		
John Felix Grain	" " " " "	6,180.26		
John Felix Cotton	" " " " "	10,262.36		
		3,415.75		
Mrs. Calliope A. Fennell	345 West 95th Street, N. Y. C.		33,652.74	
Dr. C. Irving Ferris	81st St. & Columbus Ave., N. Y. C.		173.06	
J. M. Fiske, #2			35.92	
Four Fourths Pool #2			51,402.59	
C. C. Fulton			153,640.79	
E. L. Gilbert	2211 Broadway, N. Y. C.		2,228.81	"E".
E. L. Gilbert, #1	Englewood, N. J.	12,744.71		
		21.87		
Miss S. K. Halle	Princess Bay, S. I.		12,766.58	
Emile Hemming	50 Park Ave., Passaic, N. J.		98.08	
Dr. J. R. Herzog	54 East 93rd Street, N. Y. C.		31.83	
R. S. Herzog	71 Nassau Street, N. Y. C.		937.34	
L. D. Hopkins	106 West 94th Street, N. Y. C.		26.16	
Dudley T. Humphrey	Englewood, N. J.		1,157.23	
			10,839.69	
	Forward		$295,502.08	

Plaintiffs' Exhibit 8.

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Name	*Address*		*Amount*	
	Forward		$295,502.08	
J. S. Isaacs	211 East 58th St., N. Y. C.		37.96	
Lathrop, Haskins & Co.	165 Broadway, N. Y. C.		104,416.00	
Berth Levi Pool #1	82 Pearl Street, N. Y. C.		45,970.51	
Robt. F. Little "Special"	31 Nassau St., N. Y. C.	18,453.89		
Robt. F. Little, #1	" " " "	34,773.84		
			53,227.73	
Chas. McLean	Hotel Majestic, 77th St., West, N. Y. C.		7,860.61	
Wm. McNair, "Special"	44 West 44th St., N. Y. C.		710.80	
Andrew Madison	251 West 55th St., N. Y. C.		3.16	
Mechanics & Traders Bank	Unknown		881.27	
C. W. Moe	10 Wall St., N. Y. C.		51.50	
Jamey H. Monelis	110 East 101st St., N. Y. C.		1.00	
A. P. Morrison	66 Broadway, N. Y. C.	34,732.69		
A. P. Morrison, #9 A/c	" " " "	34,292.40		
A. P. Morrison Privilege A/c	" " " "	67,083.20		
A. P. Morrison, "Note"	" " " "	5,000.00		
			141,108.29	
N. Y. Produce Exchange Bank	10 Broadway, N. Y. C.		25.00	
Thos. Norton	30 East 37th St., N. Y. C.		65.00	
Chas. H. Pardee	c/o V. N. Shelton, So. N. E. Tel. Co., Danbury, Conn.		60.41	
Albert C. Roberts	Lakeville, Conn.		1,969.57	
A. F. Roberts	" "		1,699.99	
Chas. H. Rodda	317 West 121st St., N. Y. C.		175.00	
M. Schnitzer	280 Broadway, N. Y. C.		14,876.84	**Balance on Note of $300.00 Notes for $12,500.00**
Victor N. Shelton	c/o So. N. E. Tel. Co., Danbury, Conn.		22.03	
J. B. Sheppard	c/o A. P. Morrison, 66 Broadway, N. Y. C.		637.03	
Miss Anna Small	c/o F. Grossmeyer, 55th St. & 7th Ave., N. Y. C.		3.18	
Mrs. Sarah L. Stevens	Norfolk, Conn.		6,305.70	
Miss Martha L. Stevens	" "		6,324.71	
Harry E. Stevens	" "		6,277.58	
F. Storrs	(Summer address): Box 418 White		10.50	
Harry A. Strausbourger	54 East 89th St., N. Y. C.		28.11	
Chas. W. Stuart "Note"	409 West 145th St., N. Y. C.		1,500.00	"F".
	Forward		$689,751.53	

Name	*Address*		*Amount*	
	Forward		$689,751.53	
G. T. Sullivan (Mgr.) "Grain"	Unknown	25,610.50		
G. T. Sullivan, "Cotton"	"	5,840.00		
G. T. Sullivan, "Corn Pool"	"	45.75		
			31,496.25	
Chas. F. Tannahill	Englewood, N. J.		4,688.79	
E. Taussig	9 East 59th Street, N. Y. C.		5,467.51	Note for $4,000.00
Mrs. H. K. Townsend	c/o Bretton Hall, Broadway & 85th Street, N. Y. C.		387.08	
C. Van Houton	Richmond Hill		123.80	
Dr. J. A. Ward, "Note"	841 West End Ave., N. Y. C.	730.00		
Dr. J. A. Ward, "Stock A/c"	" " " " "	175.47		
			905.47	
C. M. Washburn			21,254.16	
Henry M. Wise	40 Exchange Place, N. Y. C.		600.23	
C. P. Wycoff	11 Wall Street, N. Y. C.		18.50	
	TOTAL LIST OF ACCOUNTS RECEIVABLE		$754,693.32	"G".

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Plaintiffs' Exhibit 9.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
J. M. FISKE & COMPANY,
Bankrupts.

1169

IRVING L. ERNST, the Receiver herein, for his account sets forth the following debits:

RECEIPTS.

1910.		
Jan. 20th	Produce Exchange Bank Balance	$1,915.77
	C. M. Washburn	41.20
	Vulcan Detinning Co., Div.	96.25
Jan. 21st	A. C. Scherwood	362.41
	J. M. Fiske	92.03
Jan. 22nd	Henry & Mathews	50.00
1170	Taylor Livingston & Co.	10.00
	Stock Exchange Clearing House	72.01
Jan. 24th	Posner & Co.	159.86
	B. L. Smyth & Co.	809.92
	Floyd Jones & Robinson	301.26
	Lindly & Co.	72.50
Jan. 25th	Harris Winthrop & Co.	237.37
	" " "	256.13
	Petty cash in box	41.95
	R. H. Thomas & Co.	2,090.74
	Bamberger, Loeb & Co.	1,675.00
	J. Thomas Reinhardt	82.70

Jan.	27th	Wm. B. Bevin.....	12.50	1171
		Sale of Tax Stamps.....	244.72	
		C. S. Gilmore.....	628.25	
		A. H. Coombs & Co.....	29.69	
Jan.	29th	Wessells, Kullenkaempf & Co.	115.00	
		G. H. Prentiss & Co.....	189.98	
		Burrill & Stitt.....	4.00	
		C. M. Schatt, Jr., & Co.....	1.60	
		F. B. Cahn & Co.....	454.41	
Jan.	31st	Distillers' Securities Co. Div.	100.00	
Feb.	2nd	Eastern Kodak Co., Div...	30.00	
		Hartshorn, Boget & Botell.	875.00	1172
		L. Von Hoffman.....	250.00	
		Pacific Coast Co. Div.....	15.00	
		Goldfield Cons. Mines Co. Div.	5.00	
Feb.	4th	C. M. Schatt, Jr., & Co....	1,822.15	
		Charles McLean	630.00	
Feb.	7th	Sale of J. M. Fiske's automobile	4,275.00	
		James McVickar	2,173.99	
Feb.	8th	Carlisle Mellick & Co.....	667.63	
		Rebate on Auto, Insurance.	33.40	
Feb.	9th	Geo. F. Secor & Co.....	190.63	
Feb.	19th	Produce Exchange Bank..	1,785.29	1173
Feb.	24th	Julia Humphrey	50.00	
Feb.	28th	W. Chandler Jr.....	25.00	
Mch.	1st	Dividend	150.00	
		U. S. Cast Iron & Foundry Co. Div.	17.50	
		American Tobacco Co., Div.	20.00	
		Schloss, Schefield Steel Co. Div.	12.50	
Mch.	4th	C. P. Wyckoff	1,362.21	
		Frederick Schwed & Co...	6.25	

1174	Mch.	23rd	Rebate on House Insurance, J. M. F.....	8.85
			B. DeKraft	25.00
	Mch.	25th	Sale of 'Phone Booth ...	12.50
	Apl.	4th	W. Chandler Jr.....	25.00
	Apl.	9th	Eastman Kodak Co., Div..	20.00
	Apl.	15th	National Biscuit Co. Div..	15.00
			Cedar Lake Park Co. Div..	9.00
	Apl.	20th	Vulcan Detinning Co. Div.	17.50
			Nipissing Mines Co. Div..	4.88
			F. R. Pemberton.....	690.98
	Apl.	21st	Rebate, house insurance, J. M. F.....	15.97
1175	Apl.	29th	Nipissing Mines Co. Div..	1.13
			Grunning (Apple Orchard)	1.00
	May	1st	Goldfield Consolidated Mines Co. Div.....	5.00
			Pacific Coast Co. Div.....	25.00
		4th	American Malt Co. Div...	25.00
			Lathrop, Haskins & Co., Div. from Stock Exchange	10,493.62
		17th	Egypt Mills Club Div.....	9.00
			Sale of J. M. Fiske, boats..	1,329.60
		19th	Sale of C. M. Washburn, Household Goods	235.00
1176			W. Chandler Jr.....	50.00
	Feb.	14th	Mines Co. of America Div.	1.50
			G. G. Humphrey	24.45
			Halle & Steiglitz.....	34.38
			H. M. Wise.....	753.74
			W. W. Pell.....	49.80
		16th	B. DeKraft	200.00
		19th	H. H. Oltman.....	9,335.88
	Mch.	7th	W. Chandler Jr.	23.00
			Rebate on Auto. Insurance	85.00
		10th	Sale of Sherwood Auto ..	1,829.00
			B. DeKraft	50.00

	17th	Kerr Lake Co. Div.	25.00	1177
		Standard Oil Co. Div.....	30.00	
		B. DeKraft	5.00	
	24th	Calumet & Hecla Mines, Div.	16.00	
	30th	Buckhourt, David & McClellan	755.10	
	31st	Nevada Consolidated Co. Div.	11.25	
Apl.	1st	Merganthaler Linotype Co. Div.	12.50	
		North America Co., Div...	12.50	
		Singer Sewing Machine Co. Div.	20.00	1178
		B. DeKraft	145.00	
		Sale of 42 Broadway fixtures	769.87	
		Interest on deposits.....	225.10	
		William B. Boorum Jr...	9,000.00	

1180 **Plaintiffs' Exhibit 10.**

13213

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER 1181 OF DUDLEY T. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, Copartners, doing business under the firm name and style of J. M. Fiske & Company, Alleged Bankrupts.	Involuntary Petition by three Creditors.

1182 TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of A. T. Dindley of New York City, New York, and of Gerald M. Curran of New York City, New York, and of Stanwood E. Flitner of New York City, New York, respectfully shows:

1ST.—That Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood are and have been partners under the style of J. M. Fiske & Company, which partnership has had its principal place of business at the City of

New York, in said District, for the greater portion 1183
of the six (6) months next preceding the date of the filing of this petition, and are by occupation stock brokers, at No. 42 Broadway, New York City.

2ND.—That the said Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, composing the firm of J. M. Fiske & Company, are insolvent and owe debts in excess of One thousand dollars ($1,000); that they as individuals each owes debts which he is unable to pay in full, and that none of them are either a wage-earner or a person engaged principally in farming 1184
or the tillage of the soil.

3RD.—That your petitioners are creditors of said Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, composing the firm of J. M. Fiske & Company, having provable claims against them which amount in the aggregate, in excess of the value of securities held by them, to Five Hundred ($500) Dollars; and that neither of your petitioners is entitled to priority of payment on his said claim, within the meaning of Section 64B of the Bankruptcy Law of 1898, nor has either of your petitioners received the 1185
preference within the meaning of Section 60AB of such law, as amended.

4TH.—That the nature and amount of your petitioners' claims are as follows: A. T. Lindley, Three Hundred and Twenty-nine ($329) Dollars, due him on stock transactions had with the said firm; Gerald W. Curran, One Hundred and Thirty-Three Dollars and Thirty-one cents ($133.31), due him on stock transactions had with the said firm;

1186 Stanwood E. Flitner, Three Hundred ($300) Dollars, due him on stock transactions had with the said firm; for which we hold no securities.

5TH.—That within four months preceding the filing of this petition, committed an act of bankruptcy, in that they did heretofore, and within said four months next preceding the date of the filing of this petition, and while insolvent, transfer a certain portion of their property to one or more of their creditors, with intent to prefer such creditors over their other creditors.

1187 6TH.—That the intention of such transfers as aforesaid, was to give the creditors to whom such transfers were made, a preference over and above other creditors of the same class.

7TH.—Upon information and belief, that the said J. M. Fiske & Company within four months next preceding the filing of this petition and while insolvent, committed a further act of bankruptcy in that the said J. M. Fiske & Company gave heretofore and within the said four months and while insolvent, convey, transfer and conceal or remove, and permitted to be concealed or removed a con-
1188 siderable portion of their property with intent to hinder, delay, to defraud their creditors.

Upon information and belief, that the creditors who have provable claims against the said J. M. Fiske & Company are more than twelve (12) in number.

Wherefore your petitioners pray that the said Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, copartners, doing business under the firm name and

style of J. M. Fiske & Company, and the firm of 1189
J. M. Fiske & Company, may be adjudged involuntary bankrupts in accordance with the provisions of the Act of Congress entitled An Act to Establish a Uniform System of Bankruptcy throughout the United States, approved July 1, 1908.

That a subpœna issue pursuant to the provisions of Section 8T of said Bankruptcy Act, directed to the said Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, and the firm of J. M. Fiske & Company, and that such other and further proceedings be had as the Law in such case prescribes. 1190

Dated January 19th, 1910.

GERALD M. CURRAN,
STANWOOD E. FLITNER,
A. T. LINDLEY.

Southern District of New York, ss.:

GERALD M. CURRAN, being duly sworn, says: That he is one of the petitioners named in the foregoing petition. That he has read the said petition and knows the contents thereof; that the same is 1191
true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GERALD M. CURRAN.

Sworn to before me this 19th day of January, 1910.

HENRY K. KAUFMAN,
[SEAL.] Notary Public,
N. Y. Co.

1192 Southern District of New York, ss.:

STANWOOD E. FLITNER, being duly sworn, says: that he is one of the petitioners named in the foregoing petition. That he has read the said petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

STANWOOD E. FLITNER.

Sworn to before me this 19th day of January, 1910.

HENRY K. KAUFMAN,

1193 [SEAL.] Notary Public, N. Y. Co.

Southern District of New York, ss.:

A. T. LINDLEY, being duly sworn, says: that he is one of the petitioners named in the foregoing petition. That he has read the said petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

A. T. LINDLEY.

1194 Sworn to before me this 19th day of January, 1910.

HENRY K. KAUFMAN,

[SEAL.] Notary Public, N. Y. Co.

(Endorsed)—"U. S. District Court, S. D. of N. Y.—Filed Jan. 19, 1910. 3.25 P. M."

Plaintiffs' Exhibit 11 for Identification.

Stocks Loaned and Borrowed Book of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 12 for Identification. 1195

Customers' Ledger A to K of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 13 for Identification.

Customers' Ledger L to Z of J. M. Fiske & Co.

(Not printed by consent.) 1196

Plaintiffs' Exhibit 14 for Identification.

Purchase and Sales Book of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 15 for Identification.

Odd Lot Blotter of J. M. Fiske & Co. 1197

(Not printed by consent.)

Plaintiffs' Exhibit 16 for Identification.

Check Book of J. M. Fiske & Co., on The Mechanics National Bank of the City of New York.

(Not printed by consent.)

1198

Plaintiffs' Exhibit 17, January 11, 1911.

By Order of Irving L. Ernst, Lindsay Russell & Hartford T. Marshall, Trustees in Bankruptcy of J. M. Fiske & Co.

All right, title & interest, as Trustees in Bankruptcy, in & to the following Securities, to be sold without warranty and subject to bringing three-fourths of their appraised value.

		Prices.	
$20	United States 3% Gold Bond, due Augst, 1, 1918 Novr. 1898. Coupon on		$30
$500	Cedar Lake Park 1st Mtge. 6% Bonds, due Jany. 15, 1918. Coupons Jany. & July		$105
15 Shares	Pennsylvania R. R.	$50 each	129 ⅜
7 Shares	Chicago Great Western R. R. Prefd.	$100 each	47 ⅜
10 Shares	Iowa Central Rwy. Prefd.	$100 each	34 ¼
1199 2 Shares	Northern Securities Co.	$100 each	99 ½
5 Shares	Norfolk & Western Rwy. Common	$100 each	98 ¼
50 Shares	St. Louis & San Francisco R. R. 2d Prefd.	$100 each	41 ¼
20 Shares	Wheeling & Lake Erie R. R. Common	$100 each	5 ¼
10 Shares	Pittsburgh Coal Co. Common	$100 each	20 ½
10 Shares	Vulcan Detinning Co. Prefd.	$100 each	56
10 Shares	American Malt Corpn. Prefd.	$100 each	34 ½
100 Shares	American Hide & Leather Co. Common.	$100 each	4 ¼
30 Shares	Allis-Chalmers Co. Common	$100 each	8 ⅜
100 Shares	Columbus & Hocking Coal & Iron Co. Common	$100 each	3
100 Shares	Chicago Union Traction Co. Common Central Trust Co. Ctf. of Dep.		2 ¾
20 Shares	Chicago Union Traction Co. Prefd. Central Trust Co. Ctf. of Dep.		4 ½
20 Shares	Chicago Subway Co.	$100 each	4 ⅜
10 Shares	International Paper Co. Common	$100 each	12 ⅝
20 Shares	International Mercantile Marine Co. Common	$100 each	5 ⅛
1200 600 Shares	Manhattan Transit Co.	$20 each	$1 ⅛ per sh
10 Shares	Braden Copper Co.	$5 each	$4 per sh
6 Shares	Consolidated Arizona Smelting Co. & $50 Scrip	$10 each	$16 Lot
400 Shares	Cobalt Central Mines Co.	$1 each	7 ½c per sh
53 Shares	Cobalt Silver Queen Ltd.	$1 each	$3 Lot
250 Shares	Colonial Silver Mines	$5 each	21c. per sh
10 Shares	Ely Central Copper Co.	$10 each	$2 Lot
100 Shares	Furnace Creek Copper Co.	$1 each	$2 Lot
50 Shares	Kerr Lake Mining Co.	$5 each	$6 ½ per sh
10 Shares	Nipissing Mines Co.	$5 each	$10 ½ per sh
20 Shares	Nevada-Utah Mines & Smelters Corpn.	$10 each	$1.16 per sh
150 Shares	Ontario Silver Mining Co.	$100 each	$305 Lot
20 Shares	Quicksilver Mining Co.	$100 each	2
10 Shares	South Utah Mines & Smelters	$5 each	$1 ⅜ per sh
50 Shares	Tonopah Extension Mining Co.	$1 each	$1.01 per sh

		Prices.		
50 Shares Yukon Gold Co.	$5 each	$3 ⅞ per sh		1201
3 Shares Granby Consolidated Mining, Smelting & Power Co.	$100 each	46		
100 Shares Boverd Consolidated Mines Co.	$1 each	x		
100 Shares Boston Consolidated Copper & Gold Mining Co.	£1 each	$19 ¾ per sh		
300 Shares Consolidated Steamship Lines	$100 each	x		
200 Shares Comstock Tunnel Co.	$2 each	$7	Lot	
2,500 Shares Moqui Copper Co.	$1 each	x		
100 Shares American Bicycle Co. Common	$100 each	x		
2,500 Shares Atlas Manhattan Mining Co.	$1 each	x		
500 Shares Butte Copper Co.	$1.50 each	x		
25 Shares Coniagas Mines, Ltd.	$5 each	$80	Lot	
500 Shares Goldfield Daisy Mining Syndicate	$1 each	x		
500 Shares Pan Silver Mining Co.	$1 each	x		
25 Shares Standard Rope & Twine Co.	$100 each	x		
1,500 Shares Phoenix Gold Mining Co Prefd.	$1 each	x		
300 Shares Phoenix Gold Mining Co. Common	$1 each	x		
814,193 Shares Johannesburg Gold Mines Co.	$1 each	$1.71	Lot	1202
1,900 Shares Belcher Mountain Copper Co.	$1 each	x		
30 Shares Globe Mining Development Co.	$100 each	x		
40 Shares St. Nicholas Skating & Ice Co.	$100 each	25		
50 Shares Meatox Company Common	$100 each	x		
50 Shares Meatox Company Prefd.	$100 each	x		
80 Shares Walter Automobile Co. of N. J.	$100 each	x		
1 Share Egypt Mills Club of Pike County, Pa.	$100 each	$10	Lot	
$300 Egypt Mills Club 6% Regstd. Bonds, due Apl. 1933.		$160	Lot	
1,000 Shares Olema Oil Co.	$1 each	x		
1 Share Morris County Gulf Club	$100	$55		
125 Shares Rockaway Valley Ice Co. Common	$10 each	x		
35 Shares Rockaway Valley Ice Co. Prefd.	$10 each	x		
1,150 Shares Golden Anchor Mining Co.	$1 each	x		
770 Shares Golden Fruit Co.	$10 each	x		
160 Shares Columbian National Oil & Gas Co.	$10 each	x		
1 Share United Railways Investment of San Francisco Dividend Ctf.		x		
30 Shares Nevada Consolidated Copper Co.	$5 each	$2) ⅜ per sh		
1,000 Shares Oriental Gold Mining Co.	Withdrawn			1203
1,000 Shares Miller Gold Mining Co.				
2 Shares A. Bridgman Co.				
$550 Erie R. R. Fractional Warrant expiring Apl. 1, 1903.				
10 Shares Sherman Bank	$100 each	x		
	x Balance	$73	Lot	

1204

Plaintiffs' Exhibit 18.

Private Ledger of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 19.

[Same as Plaintiffs' Exhibit 12 for Identification.]

Customers' Ledger A to K, of J. M. Fiske & Co.

(Not printed in full by consent.)

1205 The following extracts are, however, printed as per stipulation, page 3.

EXTRACT FROM PLAINTIFFS' EXHIBIT 19.

Four-Fourths.

1909					1909			
Apr. 26.	700 H. C. & I...	Rec.	43,048.60		June 11.	100 H. C. I.....	66¼	6,610.50
May 18.	400 " ...	Rec.	25,228			1000 "	Deld	64,890
June 30.	Int. 4%.....		280.49					
	Bal.....		2,943.41					
			71,500.50					71,500.50
Aug. 10.	400 H. C. I....	Rec.	28,000		June 30.	Balance.....		2,943.41
13.	400 "	Rec.	28,344		Aug. 31.	Balance.....		81,846.36
17.	400 "	Rec.	28,300					
31.	Int. 4%.....		145.77					
			84,789.77					84,789.77
Aug. 31.	Balance				Oct. 31.	Balance.....		142,079.64
1206	1200 H. C. I..		81,846.36					
Aug. 31.	400 " ...	R.	28,380					
Oct. 25.	400 "	R.	30,756					
31.	Int. 5%.....		1,097.28					
			142,079.64					
Oct. 31.	Balance							
	2000 H. C. I..		142,079.64					
Dec. 9.	500 H. C. I....	87½	43,750					
1910								
Jan. 17.	600 "	89R.	53,400					
19.	200 "	89R.	17,800					
	Interest.....		2,211.15			Balance.....		259,240.79
			259,240.79					259,240.79
Jany. 20.	Balance.....		259,240.79					
	3300 H. C. I...." Long "							

Plaintiffs' Exhibit 20. 1207

[Same as Plaintiffs' Exhibit 13 for Identification.]

Customers' Ledger L to Z, of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 21.

Commodity Ledger of J. M. Fiske & Co.

(Not printed by consent.) 1208

Plaintiffs' Exhibit 22.

[Same as Plaintiffs' Exhibit 14 for Identification.]

Purchase and Sales Book of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 23. 1209

[Same as Plaintiffs' Exhibit 15 for Identification.]

Blotters of J. M. Fiske & Co.

(Not printed in full by consent.)

The following extracts are, however, printed as per stipulation, page 3.

1210

To Receive January 7, 1910

Of whom bought	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers
Carlisle, M. & Co.....	20	U. S. S.	88	..	$2.50	$1,762.50	S. W. Adler.....	F 254438
Franke, T. & R.....	200	Wab. Pf.	57	..	....	11,400.00	C. H.....	20346, 18945

To Receive January 11, 1910

Of whom bought	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers
Transfer	10	Sloss S.	....	..	....	....	Transfer.....	B 7244

To Receive Tuesday, January 18, 1910.

Of Whom Bought.	No. of Shares.	Description.	Price.	Int.	Commission.	Amount.	For Whose Account.	Numbers.
C. M. Schott, Jr., & Co..	10	Chic. & Alt.	64⅜	....	1.25	645.	A. M. Gillinay.....	A.-1387.
B. L. Smyth & Co., 200..	.....	.....	....	....	.....	.....	.....	G 141696
1211								332618-21
								333623-4
								326190
								327082
								330867
								328737-8
								324919-25
								311167
								336193-4
								325770-1
								325775-6
H. H. Whitney & Son, 400	3100	U. S. S.	84	....	.....	260,400	C. H.....	325772
								G 326985-7
Box	10	Sloss Sh.	....	....	.....	... .	Box.....	310057
								B 7244

1212

To Deliver Friday, January 7, 1910

1213

To whom sold	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers
Mec. Nat. Bank.....	100	Wab. Pf.	....	..	....	....	.....	20346
	30	Steel....	....	..	....	$5,000.00	Money Loans.....	F 254485

To Deliver January 11, 1910

To whom sold	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers
Box.....	10	Sloss	....	..	....	....	Box.....	B 7244

To Deliver Jan. 18, 1910.

To Whom Sold.	No. of Shares.	Description.	Price.	Int.	Commission.	Amount	For Whose Account	Numbers
Mechanics Nat. Bank	200	Steel						G. 324921-2
	10	Sloss Sh						B. 7244
	10	Chic. & Alton				15,000.	Money Loans	A. 1387

1214

1215

1216

To RECEIVE Wednesday Jan. 19, 1910.

Of whom bought	No. of Shares	Description.	Price	Int.	Commission.	Amount	For Whose Account	Numbers
	10	A. R.	94	..	....	$940	Error.....	
	10	Atch	118¾	..	$1.25	1,188.75	K. O. Eriksson.....	
	10	"	119⅛	..	1.25	1,192.50	F. Grossmayer.....	
	10	Steel	83⅜	..	1.25	837.50	J. Horn.....	
	50	"	84	..	6.25	4,206.25	B. de Kraft.....	
	10	So. Pac.	131⅜	..	1.25	1,315	F. Grossmayer.....	
	10	Utah	53⅛	..	1.25	532.50	C. Farquhar.....	
	10	U. P.	198⅛	..	1.25	1,982.50	No. 19.....	
	50	"	193	..	6.25	9,656.25	G. B. Fielder.....	
	10	B. & O.	116¼	..	1.25	1,162.50	No. 19.....	
	10	C. & O.	87	..	1.25	871.25	K. O. Eriksson.....	
	20	I. B.	23¾	..	2.50	477.50	Thos. Norton.....	
	20	Rdg.	102	..	1.25	1,621.25	B. de Kraft.....	
	30	So. Pac.	....	..	....	3,900	Stock L.....	
	50	Atch	....	..	....	6,000	L.....	
	10	Steel	....	..	....	840	L.....	
1217	10	U. P.	....	..	....	1,930	L.....	
	20	B. & O.	....	..	....	2,360	L.....	
	70	I. B.	....	..	....	1,680	L.....	
	40	A. R.	....	..	....	3,760	L.....	
	60	R. I.	....	..	....	2,760	L.....	
	5	Paul	....	..	....	735	Stock L.....	
	80	Sugar	....	..	....	9,760	L.....	
	40	Rdg.	162	..	....	3,240	Stock B.....	
	5	Paul	147	..	....	735	B.....	
	650					$63,633.75		

1218

To DELIVER Wednesday Jan 19, 1910.

1219

To whom sold	No. of Shares	Description.	Price	Int.	Commission.	Amount.	For Whose Account	Numbers
	10	Utah	53	$.02	$1.25	$528.73	J. Fountain.....	
	50	A. R.	93⅛	1	6 25	4,667.75	"	
	50	R. I.	45⅝	1	6.25	2,274	No. 19.....	
	20	Rdg.	162	20	1.25	1,618.55	B. de Kraft.....	
	20	"	162⅛	20	1.25	1,623.55	F. Grossmayer.....	
	20	"	163	20	1.25	1,628.55	H. Jacobs.....	
	10	Paul	147⅜	20	1.25	1,472.30	Hy. Strassbourger I...	
	10	Sugar	123	20	1.25	1,228.55	E. W. Ladd.....	
	20	Steel	84	40	2.50	1,677.10	A. Getto.....	
	..	....	....	..	....	3.42	Tax.....	
	..	....	....	..	....	48.75	Con.....	
	70	Atch.	119	..	....	8,330	Stock L.....	
	10	C. & O.	87	..	....	870	L.....	
	50	Steel	84	..	....	4,200	L.....	
	40	So. Pac.	130	..	....	5,200	L.....	
	70	U. P.	191	..	....	13,370	L.....	
	30	B. & O.	116	..	....	3,480	L.....	
	90	I. B.	23	..	....	2,070	L.....	
	10	R. I.	43	..	....	430	L.....	1220
	70	Sugar	123	..	....	8,610	L.....	
	..	....	....	..	....	....	.....	
	..	....	....	..	....	....	.....	
	..	Ch M. Schott Jr & Co			....	302.50	.....	
	..	....	....	..	....	....	.....	
	..	....	....	..	....	....	.....	
	650					$63,633.75		

1221

1222

To Receive Wednesday, Jan. 19, 1910.

Of whom bought	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers
	100	U. S. S.	83⅞	..	12.50	8,400	S. B. C. Co.....	
	100	Pa.	133¼	..	6.25	6,668.75	"	
	100	Paul	148	..	12.50	14,812.50	45.....	
	40	U. P.	193¼	..	5.00	7,735	H. E. Stevens.....	
	30	"	193¼	..	3.75	5,801.25	M. L. "	
	30	"	193¼	..	3.75	5,801.25	S. L. "	
	100	"	193⅝	..	12.50	19,375	S. B. C &. Co.....	
	100	Rdg.	102¾	..	6.25	8,143.75	45.....	
	100	Nor. Pac.	132	..	6.25	13,206.25	F. Barrell & Co.....	
	100	Rdg.	161⅜	..	6.25	8,100	J. Felix Spl.....	
	100	U P.	191¾	..	12.50	19,150	" "	
	200	K. T.	45	..	5.5	9,0.5	J. J. S.....	
	100	Paul	R.	..	..	14,900	F. Barrell & Co.....	
S. & G.....	100	E.		5.9.	..	3,3	Stock L.....	
"	100	C. R.		1.18	..	2,2	"	
1223 Berner.....	300	K. T.		1.31	..	13,5	"	
Jud & J.....	100	A. F.		64	..	6,6	"	
Lam.....	100	Rg.		68	..	8,1	"	
W. Morgan.....	00	Mo. Pac.		1.30	..	14,4	"	
Miller.....	100	E. H		31	..	3,9	"	
						.41	Int.....	
	100	Cop.	83	..	..	8,300		
Bal. to Deliver.....	100	C. L.	44	..	..	4,400		
	100	Sugar	123	..	..	12,300		
	100	Rdg.	162	..	..	8,100		
	1800	A. R.	94	..	..	169,200		
						386,119 16		

1224

To DELIVER Wednesday, Jan. 19, 1910. 1225

To whom sold	No. of Shares	Description	Price	Int.	Commission	Amount	For Whose Account	Numbers
	100	C. L.	48⅞	2	12.50	4,873	S. B. C. & Co.....	
	100	A. R.	93¾	2	12.50	9,360.50	H. B. Montgomery.....	
	20	Sugar	122½	40	2.50	2,447.10	H. E. Stevens.....	
	20	"	122½	40	2.50	2,447.10	M. L. "	
	20	"	122½	40	2.50	2,447.10	S. L. "	
	20	"	122½	40	2.50	2,447.10	A. C. Roberts.....	
	20	"	122½	40	2.50	2,447.10	A. F. Roberts.....	
	100	Rdg.	161⅞	1	6.25	8,086.50	J. Kramer.....	
	200	"	162¼ 163⅜	2	12.50	16,266.75	J. Felix Spl.....	
	100	U. P.	192¼	2	12.50	19,260.50	" "	
	100	Paul	148¾	2	6.25	14,866.75	F. Barrell & Co.....	
	100	Rdg	162¾	1	6.25	8,130.25	J. Kramer.....	
						14	Tax.....	
Oliphant.....	100	Cop	....	..	....	8,800	Non Del.....	
Schafer.....	1700	A. R.	....	..	....	159,8	Stock L.....	
R. H. Thomas.....	100	Paul	....	2.91	....	15	"	
Head.....	100	U. P.	....	8.04	....	19,3	"	
			....	..	....	193.75	Com.....	1226
Bal. to Receive.....	100	U. S. S.	84	..	....	8,400		
	100	Pa.	133	..	....	6,650		
	100	Nor. Pac.	132	..	....	13,200		
	100	Erie	31	..	....	3,100		
	100	C. R.	21	..	....	2,100		
	500	K. T.	45	..	....	22,500		
	100	A. F.	66	..	....	6,600		
	200	Mo. Pac.	67	..	....	13,400		
	100	E. H	39	..	....	3,900		
	100	U. P.				19,362.50		
						19.16	Ch.....	
						386,119.16		

1227

1228

To RECEIVE Wednesday, January 19/10.

Of Whom Bought	No. of Shares	Description.	Price	Int.	Commission.	Amount	For Whose Account	Numbers
Carlisle M. & Co	1	O. & W.	45	..	1	46	Paul Downing.....	
C. M. Schott Jr. & Co.	10	Rubber 1st	112½	..	1.25	1,125	J. Cooper.....	
Roberts H. & C.....	200	H. C. I.	88	..	....	17,600	Lathrop H. Co.....	
J. R. Williston & Co..	100	Frisco II	56	..	12.50	5,612.50	S. B. Chapin Co.....	
Dominick & R.100...	500	Kerr Lake	9	..	31.25	4,531.25	19	N Y 2300
Miller & Co. 300.....								
Darr & Moore 100 ...								
Darr & Moore 100 ...								
J. T. Reinhardt 300..	500	"	9	..	31.25	4,531.25	19	
Frederick Schwed & Co. 200.....								
Recd. S. B. C. & Co...	100	Cen. Lea	1	..	....	4.373	S. B. Chapin Co.....C 9750	
Dr. @ 6%.....	....	.....	....	..	....	13.21	E. A. Howe.....	
Taylor S. & E.....	100	U. S. S.	84	..	....	8,400	C. H.....G 315960	
Strong S. Co.....	100	Pa.	133	..	....	6,650	" .....40 A 324941	
								14 A 321828
								20 A 324881
								6 A 302826
								18 A 323176
								2 A 831334

1229

C. D. Barney & Co....	100	Nor. Pac.	132	..	....	13,200	"	
Feuchtwanger Co.....	100	Erie	31	..	....	3,100	" 35–R11300	
								65 R20131
S. L. Blood Co.....	100	C. R.	21	..	....	2,100	"	
J. L. Graham Co. 100	500	K. T.	45	..	....	22,500	"	028002
E. & C. Randolph.200								20–B019040
T. L. Manson Co.200								50–B018760
								025171
								10 A 01124
								20–20 B 019279
E. & C. Randolph.....	100	A. S.	66	..	....	6,600	" 33869	
Wilmerding M. L.....	200	Mop.	67	..	....	13,400	"	
W. R. Holligan Co.....	100	Erie II	39	..	....	3,900	"	
J. J. Manning.....	100	U. P.	..	..	....	19,302.50	" 196056	
Check	....	.....	..	..	....	19.16	"	
Com.....	....	.....	..	..	193.75	193.75	"	
Mec. Nat. Bk.....	200	Steel	..	..	....	.....	.....G 324922	
"	10	Sloss Sh.	..	..	....	.....	.....B 7244	
"	10	Alton	..	2.08	....	15,000	Money Loans.....A 1387	

1230

To DELIVER Wednesday, January 19/10.

1231

To Whom Sold	No. of Shares	Description.	Price	Int.	Commission.	Amount	For Whose Account	Numbers
G. Sidenberg	100	Balance				26,311.46		
DeC & Dor	10	Rubber rts	9c.			9	S. B. Chapin Co.	
		Boston C.	20¼	02	1.25	203.73	J. Fountain	7-30013
Muller & Mash	210	Yukon	4⅞	22	13.13	1,010.40	"	2-19754 1-18228 10-D 9920 50-D 11620 30-D 10940 20-D 13230 100-C 141445
C. M. Schott Jr. Co	50	Frisco II	56	..	6.25	2,792.75	"	
Del. S. B. C. & Co	100	U. S. S.	....	..	.....	8,400	S. B. Chapin Co	G 315960
"	100	Pa.	....	..	.....	6,668.75	"	
"	100	U. P.	....	..	.....	19,375	"	Odd lots
Del. L. H. & Co	200	H. C. I.	....	..	.....	17,600	Lathrop H. Co	176556
Del. S. B. C. & Co	100	Frisco II	....	..	.....	5,612.50	S. B. Chapin Co	
L. M. Prince Co	100	A. C. P.	83	..	.....	8,300	C. H.	
Libarie & Cook	100	Cen. Lea	44	..	.....	4,400	"	
Thompson T. R.	100	Sugar	123	..	.....	12,300	"	C 9750
Allen McG. Co	100	Rdg.	162	..	.....	8,100	"	
Wardwell A. 200 Emery, J. E. 300 M. C. B. Co. 300 Richardson N G. 1000	1800	A. R.	94	..	.....	169,200	"	N 10417
Sdy	....	.....	....	..	.....	291.63	Com	
"	....	.....	....	..	.....	1.24	Tax	
Del. F. B. Co	100	A. C. P.	....	..	.....	8,293.75	F. Barrell & Co	
"	100	N. Y. Cent.	....	..	6.25	11,793.75	"	
"	200	Wh. & L. E.	....	..	6.25	987.50	"	
Sdy	....	.....	....	..	12.50	25	Com	
Check	....	.....	....	..	.....	2	"	

1232

1233

1234

To Receive January 19, 1910

	Of whom bought	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers
	G. Sidenberg	100	Atch.	....	..	....	....		93492
	"	100	K. T.	....	..	....	....		92880
	"	200	Wab. 4's	....	2.60	....	$25,000	Money Loans	13084
									30931-4
									22875-7
									28852-4
									22871
									22869
									20745
									20746
									20744
	Nat. City Bk.....	100	Nor. Pac.	....	..	....	....		9810
									16468-70
	"	100	Utah Cop	....	..	....	....		50 C39882
	"	300	H. C. I.	....	..	....	....		50 C40058
									11973
	"								5329
	.....	400	Gt. No. P.	....	..	....	....		4089
									4386
									69460
1235	"								67271-2
	.....	500	K. T.	....	22.22	....	100,000	Money Loans	50
									A79663
									80851
									026575
									27663
									25464
	Box.....	10	Boston Cop.	....	..	....	....	Box	26608
									26429
	"	210	Youkon	....	..	....	....	"	7-20113
									2-19754
									1-18238
									10D9920
									30D10940
									50D11620
	Reed Lathop H. Co...	100	H. C. I.	89	..	....	8,900	Berth Levi Pool..	20D18220
	" ...	200	"	87	..	....	17,800	Four-fourths	100C14144
									5558
	Box.....	40	Mop. etc.	....	..	....	....	Box	4751
									5521
									$360-3810
	"	10	Ten. cop	....	..	....	....	"	500-1598
	To 10 Ice.....	..	.....	....	..	....	....		220-2675
	Box.....	1	Mop.	....	..	....	7.50	Error	$360-3474
	Deposit.....	..	.....	....	..	....	....	Box	H1761
	Reed.....	10	I. B.	....	..	....	2,400	Prod. Exch. Bk	Q44012
	"	100	Wb.& L.E.	....	..	....	....	J. J. McGrane	T3516
								F. Grossmeyer	6152
1236	A. H. Combs.....	100	Rdg.	3⅛	..	....	8,050	Stk. Loans	N10417

To DELIVER January 19, 1910

1237

To whom sold	No. of Shares	Description.	Price	Int.	Commission	Amount	For whose account	Numbers
Schott	10	Ten. Cop.	....	..	....	870	Nondely	H1761
"	10	Mop. rts.	....	..	....	.81	"	3474
Carlisle M. & Co.	10	"	....	..	....	1.25	"	$360-2801
"	20	"	....	..	....	2.50	"	$500-1598 220-2675
To 10 Ice	..	.....	....	..	....	7.50	M. S Hottenstein	
Check	..	.....	....	..	....	200	G. A. Kerr	
Carlisle M. & Co.	1	Mop.	....	..	....	72.18	Nondely	
Check	..	.....	....	..	....	688.75	Mrs. J. Cooper	A44012
"	..	.....	....	..	....	100	Mrs. G. Lee	
"	..	.....	....	..	....	100	M. F. Corin	
"	..	.....	....	..	....	200	Henry Carter	
"	..	.....	....	..	....	1.111.25	H. Jacobs	
C. Fairchild & Co.	100	Wh. & L. E.	....	..	....	200	J. Horn	
Check	..	.....	....	..	....	600	Nondely	
Central T. Co.	100	H. C. I.	....	..	....	5,000	F. Barrell & Co.	6152
Chase Natl	100	"	....	..	....	....	Sub	5329
Tfr.	100	Atch.	....	..	....	....	Sub	4039
F. Barrell Co.	100	T. A. V.	....	..	....	....	J. Kirkby	93492
Lincoln Tr. Co.	200	Cent. Lea.	....	..	....	1,600	F. Barrell	
Met. Tr. Co.	100	Erie	....	..	....	....	Sub	C1005 odd lots
						....	Sub	85-R11300 65-R20131

1238

1239

1240

To Receive Jan. 19, 1910

Of whom bought.	No. of Shares.	Description	Price	Int.	Commission	Amount	For whose account	Numbers
Tfr	100	Atch.	32	..	....	....	Transfer	109216
Central T C..	200	Cen. Lea.	....	.31	....	....	Sub	C 1005
								50-B 14526
								10-B 14459
Chase Natl	100	Nor Am.	....	..	....	....		20-B 14471
Lincoln T. Co	100	Utah Cop.	....	..	....	....	Sub	20-B 13814
"	100	C. T. X.	....	..	....	....	Sub	38054
Met. Tr	50	Frisco II.	....	..	....	....	"	12038
							Sub	A 1958
								1 F 5062
								10 G 2820
								10-F 4616
Int. @ 6	....	....	....	..	....			4-F 5069
F. Barrell & Co	100	T. A. V.	....	..	....	.64	Anna Small	25-F 4984
G. Sidenberg	100	Rubber rts	....	..	....	1,600	Non dly	
Schott	50	Frisco II.	....	..	....	9	"	
Lathrop, H.C	200	H. C. I.	....	..	....	2,800	"	
S. B. Chapin Co	100	Frisco II.	....	..	....	17,600	"	
L. M. Prince & Co	100	A. C. P.	....	..	....	5,612	50 "	
Thompson & Co	100	Sugar	....	..	....	8,300	"	
Wardwell & A	200	A. R.	....	..	....	12,300	"	
1241 E. Meyer, Jr. Co	300	"	....	..	....	18,800	"	
M. C. Bouvier & Co	300	"	....	..	....	28,200	"	
R. Norton & Co	1000	"	....	..	....	28,200	"	
F. Barrell & Co	100	N. Y. Cent.	....	..	....	94,000	"	
"	200	Wh. & L. E.	....	..	....	11,800	"	
Draft	....	....	....	..	....	1,000	"	
Check Schott	....	....	....	..	....	360	C. McLean	
M. C. B. Co	2700	H. C. I.	....	37.35	....	302	50 Ck odd	
Sdy	....	....	....	..	....	224,100	M. C. Bouvier Co	
"	....	....	....	..	....	62	48 Int	
F. Barrell Co	100	A. C. P.	....	..	....	2	08 "	
						8,800	Nondely	
Tfr	10	Sloss Sh.	....	..	....	....	Tfr	B 7369
"	4	K. T. Rfd.	....	..	....	....	"	2-B 14146-7
	11926					777,704	32	

1242

To Deliver Jan. 19, 1910

1243

To whom sold	No. of Shares	Description	Price	Int.	Commission	Amount	For whose account	Numbers	
Dom	100	Atch.	....	..	....	....	Deld	109216	
Schott	10	Rubber I	....	..	....	....	Non dely		
Roberts, Hall & Co	200	H. C. I.	....	..	....	1,123 75	"		
J. R. Williston & Co	100	Frisco II	....	..	....	17,600	"		
Miller & Co	200	Kerr Lake	....	..	....	5,600	"		
Darr & M	100	"	....	..	....	1,800	"		
"	100	"	....	..	....	900	"		
J. T. Reinhardt	300	"	....	..	....	900	"		
Fred'k Schwed & Co	200	"	....	..	....	2,700	"		
C. D. Barney & Co	100	Nor. Pac.	....	..	....	1,800	"		
S. L. Blood & Co	100	C. R.	....	..	....	13,200	"		
E. & C. Randolph	200	K. T.	....	..	....	2,100	"		
Wilmerding, M. & Co.	200	Mop.	....	..	....	9,000	"		
W. R. Hooligan & Co	100	Erie II	....	..	....	13,400	"		
Carlisle, M. & Co	1	O. & W.	....	..	....	3,900	"		
M. C. B. & Co	2700	H. C. I.	....	..	....	4	"		
Sdy	....	....	....	..	....	170,100	M. C. Bouvier Co		
Div. 100 N. Y. Cent	....	....	....	..	....	13 85	Int		
Mec. Nat. Bank	100	Kerr Lake	....	..	....	125	Dividend		
"	100	A. F.	....	..	....	....	Sub	M–2300	
"	200	Steel	....	..	....	....	"	33869	
"	10	Sloss Sh.	....	..	....	....	"	G–324921-2	
"	10	Alton	....	..	....	....	"	B–7244	
"	20 M	Wab. 4's	....	..	....	....	"	A–1387	
								12034	1244
								30931-4	
								22875-7	
								28852-4	
								22871	
								22869	
								20748	
								20746	
								20744	
"	100	Nor. Pac.	....	..	....	....		9810	
"	400	H. C. I.	....	..	....	....	"	16468-70	
								50 C–39882	
								50 C–40058	
							"	4586	
"	400	Gt. Nor. pfd.	....	..	....	....		5558	
								4751	
							"	5521	
								69460	
"	900	K. T.	....	..	....	....		67271-2	
								50 A–79668	
							"	50 A–80851	
								O–26575	
								27663	
								25464	
								26603	
								26429	
								26820	
								28032	
								25171	
								10 B–01124	1245
"	10	I. B.	....	..	....	....		10 B–019040	
"	100	No. Amer.	....	..	....	....	"	20 B–019279	
"	200	Utah Cop.	....	..	....	....	"	50 B–018760	
						....	"	T–3516	
"	100	C. T. X.	....	..	....	....	"	38054	
Box	50	Frisco II.	....	..	....	....		12088	
								11973	
							Box	A–1958	
								1 F–5062	
								10 G–2830	
								4 F–5069	
								10 F–4616	
								25 F–4984	
Deld	10	Sloss Sh.	....	..	....	....	Deld	B–7269	
	4	M. K. T. Pd.	....	..	....	....	Deld	2 B–14146-7	
					Balance.	211,464 57			
	11926					777,704 82			

1246 **Plaintiffs' Exhibit 24.**

Stock Record Book of J. M. Fiske & Co.

(Not printed by consent.)

Plaintiffs' Exhibit 25.

[Same as Plaintiffs' Exhibit 11 for Identification.]

Borrowed and Loan Book of J. M. Fiske & Co.

1247 (Not printed by consent.)

Plaintiffs' Exhibit 26.

Book of check stubs of J. M. Fiske & Co. on The Mechanics National Bank of the City of New York. Nov. 26, 1909, to Jan. 3, 1910.

(Not printed in full by consent.)

The following extracts are however printed as per stipulation, page 3.

1248

EXTRACT FROM PLAINTIFF'S EXHIBIT 26. 1249

Deposits.			Checks.	
Balance, 12/30		29,819.50	58895	
Mech. Natl.		400,000.00	C. M. Schott....	872.50
James Haworth	300.00		10 Sloss	
C. F. Brown	15.00			
Hamlin, M. S.	30.00			
J. M. F.	290.00			
C. M. Schott	403.75		58938	
C. B. Edwards	2,534.17		Mech. Natl.	400,000.00
Mer, T. Co.	37.50			
Youkon Gold Co.	20.00			
Nevada Con. Co.	48.75			
De Coppet Co.	3,400.00			
S. & Gallatin	42,900.00			
		49,979.17		1250
C. H. Dft	124.57			
C. M. Schott	3,700.00			
Ulman & Co	4,850.00			
W. B. Franklin & Co.	13,500.00			
Roberts, H. & C.	18,100.00			
C. M. Co.	1,365.00			
		41,639.57		
John Muir & Co.	3,625.00			
Bishop, L., & Co.	11,600.00			
Carpenter, B., & Co.	16,500.00			
M. C. Bouvier & Co.	15,900.00			
Carpenter, B., & Co.	821.88			
C. E. Wells & Co.	200.00			
Mestre & Co.	4,400.00			
H. L. Horton & Co.	4,300.00			
S. B. Chapin & Co.	11,625.00			
"	11,650.00			
J. M. F. Co.	5,450.00			1251
"	881.25			
"	221.25			
M. C. B. Co.	61,800.00			
W. Morgan & Co.	41,100.00			
C. M. S., Jr., & Co.	11,900.00			
		201,974.38		
Trust Co. of A.		100,000.00		
C. M. Schott, Jr., & Co.	32.50			
Corn Ex. Bk.	100,000.00			
First Nat. Bk.	1,555.00			
		101,587.50		
Mechanics' Natl. Bk.		15,000.00		
J. M. F. & Co.		872.50		
Mutual Life Ins. Co.		11,384.90		
		952,259.52		

1252

Plaintiffs' Exhibit 27.

[Same as Plaintiffs' Exhibit 16 for Identification.]

Check Book of J. M. Fiske & Co. on The Mechanics National Bank of the City of New York, Jan. 3, 1910, to Jan. 19, 1910.

(Not printed in full by consent.)

The following extracts are printed as per stipulation, p. 3.

1253

1254

EXTRACT FROM PLAINTIFF'S EXHIBIT 27.

January 7, 1910.

Deposits.			Checks.	
Balance, 1/3		31,171.64		
Mech. Natl.		400,000.00	59120	
S. L. Stevens	25.00		Carlisle, Mellick & Co.	1,760.00
S. & Gallatin	575.00			
Schott	495.00		20 U S S	
W. C. Coehn	300.00			
P. Berman	20.00			
C. H. Dft	432.58			
Atwood, V., & Co.	8,350.00			
H. Block & Co.	1,800.00			
J. Kraus	50.00		59125	
O. Kirkby	100.00			1256
Nat. Park Bk.	13,811.25		Frarke, T. & R.	11,400.00
H. Content & Co.	15,900.00			
C. Head & Co.	1,062.50		200 Wab. pf.	
Chase Natl.	606.25			
B. Loeb & Co.	1,062.50			
Thompson & Co.	1,062.50			
Carlisle, M., & Co.	143.75		59141	
		45,796.33	Mech. Natl.	400,000.00
M. C. B. & Co.	49,700.00			
Hanover	1,892.50			
J. M. F. & Co.	2,500.00			
Lathrop, H., & Co.	9,100.00			
L. M. Prince & Co.	1,075.00			
Herrick, H., & Co.	20,100.00			
H. C. Taylor	2,500.00			
T. J. Taylor	52,800.00			
Laidlaw & Co.	5,362.50			
Muller & N.	215.00			1257
"	268.75			
Carlisle, M., & Co.	550.00			
Nat. City Bk.	1,221.25			
" " "	85,000.00			
W. L. May	3,225.00			
Imp. & T. Natl.	625.00			
		236,135.00		
Mech. Natl.		5,000.00		
		718,102.97		

1258 January 18, 1910.

	Deposits.			Checks.	
	Balance, 1/17/10		48,182.07		
	Mech. Natl.		500,000.00		
	Dick B. & Co.	3.12		59478	
	L. C. Riva	50.00		C. M. Schott	643.75
	J. R. Wood & Son	13,512.50		10 C & Alt.	
	Harriman & Co.	2.00			
	Barrell & Co.	2.00			
	A. C. Sherwood	100.00		59482	
	M. C. B. & Co.	78,000.00		B. L. Smyth & Co.	226,800.00
			91,669.62	2700 U S S	
	S. B. C. Co.	13,062.50			
	"	17,250.00		59483	
1259	H. K. Burras	32,200.00		H. N. Whitney & Co.,	
	Tailer & R.	15,000.00			33,600.00
			77,512.50	100 U S S	
	H. P. Montgomery	1,000.00			
	S. B. C. Co.	11,900.00		59519	
	"	5,162.50		Mec. Nat'l Bank,	
	"	7,912.50			500,000.00
	M. A. Gaines	5,000.00			
	Lincoln T. Co.	100,000.00			
			130,975.00		
	Parkinson & B.	10,750.00			
	L. F. Rothschild	10,837.50			
	Farson Son & Co.	10,837.50			
	Keen & Ward	2,200.00			
	M. C. B. & Co.	147,576.78			
	R. H. Thomas & Co.	28,400.00			
	Keane, Z & P.	6,600.00			
	Zimmerman & F.	28,200.00			
	Muller & Co.	3,900.00			
	C. E. Schaefer	8,371.25			
1260	W. E. Lane & Co.	8,100.00			
	J. J. Danzig & Co.	6,200.00			
	Randolph	13,400.00			
	R. C. White & Co.	500.00			
	J. M. F. & Co.	4,000.00			
	"	8,900.00			
	"	1,075.00			
			299,848.03		
	J. L. Graham	10,850.00			
	"	10,862.50			
	Bamberger Bros.	38,400.00			
	L. H. & Co.	8,900.00			
	Harris W. & Co.	5,000.00			
	M. C. B. & Co.	12,282.96			
	J. H. Oliphant & Co.	8,300.00			
	J. L. Graham & Co.	10,850.00			
	G. Sidenberg	25,000.00			
			130,445.46		
	Mech. Natl.		15,000.00		
			1,293,632.68		

January 19, 1910.

1261

Deposits.			Checks.	
		26,311.46	59522	
S. B. Chapin Co.....	8,400.00		C. McLean.....	300.00
"	6,668.75			
Muller & N.....	975.00		59523	
"	48.75		Manhattan Co.....	19.16
S. B. Chapin & Co...	19,375.00			
De Coppet & D.....	205.00		59524	
C. M. Schott.....	370.00		C. M. & Co.....	45.00
Carlisle M. & Co.....	1.25		1 O & W	
"	2.50			1262
F. Barrell & Co.....	5,000.00		59525	
C. Fairchild Co.....	600.00		C. M. Schott.....	1,123.75
Carlisle M. & Co.....	72.13		10 Rubber, 1st.	
G. S. Kerr.....	200.00			
C. M. Schott.....	2.00		59526	
Allen McG. & Co.....	8,100.00		R. H. & Criss....	17,600.00
Libaire & Cooke.....	4,400.00		200 H. C. I.	
		54,420.38		
	125.00		59527	
	3,900.00		J. R. Williston & Co.,	
	13,400.00			5,600.00
	5,600.00		100 Frisco II.	1263
	17,600.00			
	1,800.00			
	13,200.00			
	900.00			
	1,800.00			
	2,100.00			
	2,700.00			
	1,123.75			
	9,000.00			
	45.00			
		73,293.75		
Balance		211,464.57		
		365,490.16		

	Deposits.	Checks.
1264		59528 Dom & R..... 900.00 100 Kerr L.
		59529 Miller & Co..... 1,800.00 200 Kerr L.
1265		59530 J. T. Reinhardt.... 2,700.00 300 Kerr L.
		59531 Frederick Schwed & Co. 1,800.00 200 Kerr L.
1266		59532 Darr & M..... 900.00 100 Kerr L.
		59533 S. B. C. Co..... 4,373.00 100 C. L.

1267

Deposits.	Checks.
	59534 Taylor S. & E..... 8,400.00 100 U. S. S.
	59535 Strong S. & Co.... 6,650.00 100 Pa.
	1268 59536 C. D. Barney & Co. 13,200.00 100 Un. P.
	59537 Fenchtwanger & Co., 3,100.00 100 Erie.
	59538 1269 S. L. Blood & Co.. 2,100.00 100 C. R.

	Deposits.	Checks.
1270		59539 J. L. Graham & Co.. 4,500.00 100 K. T.
		59540 E. & C. Randolph...9,000.00 200 K. T.
1271		59541 T. L. Manson & Co. 9,000.00 200 K. T.
		59542 E. & C. Randolph.. 6,600.00 100 U. S. S.
1272		59543 W. M. & C..... 13,400.00 200 Mop.
		59544 W. R. Hollins..... 3,900.00 100 Erie II.
		59545 J. R. Manning... 19,362.50

1273

Deposits.	Checks.
	59546 C. M. Schott..... 302.50 C. H. & odd.
	59547 G. Sidenberg..... 25,002.60 Loan Pd.
	59548 1274 Nat'l City..... 100,022.22 Loan Paid.
	59549 Lathrop H..... 8,900.00 100 H. C. I.
	59550 L. H. & Co..... 17,800.00 200 H. C. I. 1275
	59551 Mech. Nat'l..... 15,002.08 Loan Pd.
	59552 A. H. Coombs.... 8,050.00 100 Rg.

1276

Deposits.	Checks.
	59553
	M. C. B. & Co... 24,337.35
	M. K. D.
	2700 H. C. I.
	59554
1277	M. C. B. & Co... 21,600.00
	M. K.
	2700 H. C. I.
	59555
	M. C. B. & Co... 8,100.00
	M. K. D.
	H. C. I.
	365,490.16

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or liable to the said Bank for money lent, 1321
or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee, or any other claim, or *in any other manner whatsoever*, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness or liability may arise against the undersigned, or his, its, or their executors, administrators, assigns, or successors, namely:

1. All securities and property then or 1322
thereafter deposited by the undersigned with said Bank, as collateral security to any such indebtedness or liability of the undersigned to said Bank, shall also be held by said Bank as security for any other indebtedness or liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description theretofore or thereafter left with said 1323
Bank for safe keeping or otherwise, or coming into the possession or under the control of said Bank in any way, as security for any indebtedness or liability of the undersigned to said Bank now existing or thereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as collateral security, for all existing liabilities of the undersigned to said Bank, approved se-

curities to an amount satisfactory to said Bank, and upon the failure of the undersigned to keep with said Bank at all times, a margin of securities for such liabilities of the undersigned, satisfactory to said Bank or at any time to comply immediately with the demand of the said Bank for additional approved security, as collateral, or upon any failure to pay on demand any indebtedness or liability due on demand to said Bank, or upon failure to meet any business obligation, or upon any assignment for the benefit of creditors, or act of bankruptcy, whether voluntary or involuntary, by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall, at the option of the said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

It is hereby expressly agreed that a request in writing delivered at Street or deposited in the Post Office or in any drop-letter box within the City of New York regularly maintained by the United States Government, enclosed in a post-paid wrapper directed to the undersigned at said address, or delivered to any Telegraph Company at its office in the vicinity of said Bank in the Borough of Manhattan, New York City, for transmission by telegraph, to the undersigned at said address, shall be a sufficient demand for additional security or for payment of any indebtedness or liability due on demand to said Bank.

3. Upon failure of the undersigned either 1327
to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities, as above provided, then and in either event said Bank may immediately, without advertisement, and without notice to the undersigned, sell any of the securities or property held by it as against any or all of the indebtedness or liabilities of the undersigned, at private sale or Broker's Board or otherwise, or may, without notice, discount, collect, compound, compromise, settle, manage and turn the same into cash according to opportunity, at 1328
the discretion of any of the officers of said Bank, and apply the proceeds thereof as far as needed toward the payment of any or all of such indebtedness or liabilities together with interest and all expenses (legal or otherwise) of sale or collection, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly 1329
waived and released. Upon default as aforesaid said Bank may also apply toward the payment of the said indebtedness or liabilities all balances of any deposit account of the undersigned with the said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future, as well as to existing transactions between the undersigned and said Bank.

Dated New York, the day of 19

1330 **Plaintiffs' Exhibit 32.**

N Form 334.

$..... NEW YORK, 191...

ON DEMAND for value received promise to pay to

NATIONAL BANK OF COMMERCE IN NEW YORK

or order, at the office of said bank in the City of New York, the sum of

1331 Dollars.

It is expressly agreed that the stocks, bonds, or other securities, or the proceeds thereof, purchased by the undersigned with, or which may come into possession or control of the undersigned, out of the moneys loaned by said Bank, and evidenced by this note shall be by the undersigned, or its agent, or representative, held in trust for and deposited with said Bank, it being the intention and agreement of the undersigned to pledge and deposit with said Bank and to subject to the lien and control of said Bank

1332 as such pledgee the securities or moneys so acquired, as collateral to this obligation and to any other obligation or indebtedness of the undersigned to said Bank; and it is further agreed that said Bank shall have a lien upon all property of the undersigned and all collaterals pledged by the undersigned, now or hereafter in possession of said Bank, or under its control, as security for any indebtedness of the undersigned, now existing or to become due or that may be hereafter contracted, with the right at any time to demand additional security and with the

right, in case of failure to comply with such 1333
demand for additional security or in case of default in payment, to sell without advertisement or notice to the undersigned, at any broker's board in the City of New York, or at public or private sale in the said City or elsewhere, or to otherwise dispose of the same in the discretion of any of the officers of the said Bank without notice of amount due or claimed to be due, without advertisement, and without notice of the time or place of sale, each and every of which is hereby expressly waived, applying the proceeds thereof upon the said indebtedness, together 1334
with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

It is further agreed that, upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall have a claim against the maker hereof for any deficiency arising upon such sale.

It is further agreed that any moneys or property at any time in the possession of 1335
said Bank belonging to any of the parties liable hereon to said Bank, and any deposits, balance of deposits, or other sums at any time credited by or due from said Bank to any of said parties may at all times at the option of said Bank be held and treated as collateral security for the payment of this note or the indebtedness evidenced hereby whether due or not due, and said Bank may at any time at its option without demand for payment and without notice charge this note to the account of the undersigned with

1336 said Bank or set off the amount due or to become due hereon against any claim of any of said parties against said Bank.

.....

Plaintiffs' Exhibit 33.

	Creditor	Amt. of Claim Filed
	Max Aleleban	350.00
	Albin S. Anderson	469.59
1337	Cyrus C. Baker	1,080.00
	Wm. A. Ball	199.83
	Geo. I. Batchelder	831.50
	John W. Beaty	1,724.87
	Julius Berggren	370.00
	M. C. Bolger	65.29
	James H. Brennen	518.10
	Chas. de H. Brower, Jr.	400.00
	Edward A. Bunker	209.29
	S. J. Burrell	9,855.80
	Zissie Caloir	869.32
	Henry Carter	954.74
	Wm. Childs	340.00
1338	Herbert Clifford	67.74
	J. B. Conversey	293.00
	Martin J. Dolan	688.00
	C. A. Eckerson	334.13
	Simeon B. Eisendrath	390.91
	Karl O. Eriksson	256.94
	Sterie Etta	1,768.61
	John T. B. Feltham	430.00
	John Fountain	766.63
	Clarence W. Gaylor	748.44
	H. J. Girlow	727.59
	George Gilmore	766.39
	Emma Grange	396.72

Creditor	Amt. of Claim	Filed
Wm. Guldenkirk	1,055.00	1339
J. G. Haas	183.18	
James Haworth	300.00	
A. Helmrath	2,079.71	
George F. Hoagland	112.52	
James Horn	523.29	
Herbert Jacobs	1,523.76	
Otto Jensen	42.00	
Harold Jewell	70.39	
Chas. O. Johnson	76.22	
Patrick Kelly	1,357.02	
Thomas Kenney	303.17	
David Kerbs	137.90	1340
Mrs. Mayrose G. Keesler	235.80	
Mrs. Gideon Lee	222.80	
Andrew Leffler	200.00	
Peter McDermott	52.69	
Angus McGillivery	4,863.24	
J. J. McGrane	392.50	
Alexander McKenzie	110.60	
Adolph Maier	92.00	
Robert Maxwell	1,718.53	
Mrs. Martha Mechtold	2,034.02	
B. Meras	1,164.09	
John Mogren	180.74	
Mrs. Caroline T. Moran	1,331.73	1341
Harry A. Moss	28.00	
O. Kirby	9.27	
J. T. North	379.37	
Ernest Olsen	135.29	
Chas. G. S. Reed	100.00	
Everard Roberts	19,456.37	
John Rooney	220.48	
A. G. Rosentreter	189.81	
James Russell	428.55	
Roberts, Hall & Criss	59,758.78	
John Safstrom	321.99	
Charles M. Severy	67.27	

	Creditor	Amt. of Claim Filed
1342	Dr. R. A. Sheppard	1,115.64
	Mrs. C. B. Sherwood	3,872.68
	Morris Skalmer	967.07
	Oliver Drake Smith	1,760.42
	Peter Smith	2,052.49
	Jos. J. Steindler	18,085.85
	Leo Theimer	245.14
	Alfred H. Tompkins	601.04
	Mrs. F. S. Vermilye	11,814.18
	H. R. Vermilye	7,927.37
	H. R. Vermilye	460.93
	Alfred Vey	162.57
1343	Wm. I. Walker	35,638.67
	E. R. Washburn	97,132.13
	Chas. Wasley	38.45
	Albert G. Williams	328.88
	J. R. Wood & Sons	27,275.00
	C. Van Houten	36.20
	Samuel W. Adler	14,972.75
	Thomas T. Amos	481.80
	J. A. Baer	2,593.69
	Paul Baridon	134.61
	C. H. B. Chapin	670.77
	A. D. Childs	1,896.94
	Paul E. Downey	47.00
1344	Amos Getto	408.97
	Achsah J. Maddock	2,114.57
	Henry B. Montgomery	1,160.50
	Mrs. Jennie K. Soleliac	937.73
	Emile G. Stein	94.08
	P. J. Steindler	7,400.00
	Mrs. Charlotte L. Anderson	400.00
	O. E. Anderson	775.68
	Jos. A. Baloun	144.22
	George L. Barton	30.46
	Pemberton Berman	244.12
	Herbert Childs	527.00
	Mrs. Ella E. Craig	26,107.38

Creditor	Amt. of Claim Filed	
Mrs. Eliza Mulford Curran	760.73	1345
Gerald M. Curran	133.49	
Endicott Fiske	16,168.87	
Caroline W. Fiske	10,000.00	
S. F. Flitner	313.55	
Wm. J. Gilbert	210.01	
Lewis Jacobs	172.00	
Bernard Leviton	200.00	
Dr. James A. Meek	243.86	
Norman C. Raff	892.91	
Miss Edith L. Satterlee	1,393.65	
Leonard Hull Smith	339.87	
Louis M. Tucker	13.90	1346
Robert Weld	322.23	
Daisy McVicker	5,169.95	
W. S. White	63.21	
Walter Loeb	123.50	
Addressograph Co.	8.65	
McVickar Realty Co	437.50	
Postal Telegraph Co	3.25	
Home Library & Supply Assn	49.45	
Reinhard Bros	11.00	
Roneo Co	3.95	
A. B. Dick & Co	6.25	
Library Bureau	20.95	
J. S. Bache & Co	724.86	
M. C. Bouvier & Co	58,565.28	1347
W. J. Buttfield	1,413.63	
Finley, Barrell & Co	46,351.34	
Batchelder, Adee & Rawlins	161.20	
Clark, Dodge & Co	3,557.18	
Dick Bros & Co	51.83	
G. W. Dougherty & Co	699.04	
P. J. Goodhart & Co	3,615.36	
Griesel & Rogers	92.81	
Goldman, Sachs & Co	8,009.92	
C. I. Hudson & Co	15,625.55	
Henry & Matthews	1,531.61	

	Creditor	Amt. of Claim Filed
1348	Hendrickson, Hall & Co.	539.33
	Keech, Loew & Co.	8,083.99
	Ladenburg Thalmann & Co.	39.70
	George Leask & Co.	415.99
	A. L. Lindley	239.24
	Geo. H. Robinson & Co.	242.76
	J. H. Jacquelin & Co.	43.70
	Ulman & Co.	4,248.88
	J. R. Williston & Co.	141.25
	C. E. Welles & Co.	933.02
	H. N. Whitney & Sons	4,524.90
	Waterman & Co.	10,448.82
1349	Adolph Solomon	4,850.00
	Max Lillienthal	12.00
	Direct Line Telephone Co.	99.60
	Doremus & Morse	139.58
	Peerless Towel Supply Co.	3.33
	Albert Gerber	12.00
	N. Y. Telephone Co.	279.83
	Dow, Jones & Co.	107.65
	Marcus S. Hottenstein	18,158.16
	Chas. A. Becker	2,455.75
	James Beattis	522.00
	E. A. Howe	449.17
	David A. Kennedy	1,140.00
1350	Jos. Kramer	1,900.00
	Malcom & Coombe	202.46
	John Muir & Co.	12.00
	Dr. Charles Jaeger	360.25
	Harold Jewell	200.39
	E. W. Ladd	80.00
	A. Archer	10.00
	Joseph Isaacs	8.00
	Jacob Leitner	1,966.98
	Central Trust Co.	71,635.69
	Bank of New York	20,190.67
	Chase National Bank	13,581.58
	Lincoln Trust Co.	45,159.50

Creditor	Amt. of Claim Filed 1351
Plaza Bank	3,113.80
U. S. Mortgage & Trust Co.	5,656.14
Mechanics & Metals National Bank.	199,299.60
Total	996.958.74

CLAIMS FILED AGAINST DUDLEY T. HUMPHREY, INDIVIDUALLY.

Alexander Craighead	55.00
J. Finley Bell	67.00
Wm. H. Humphrey	300.00
Pinkus Bros.	18.41
Total	$440.41

1352

CLAIMS FILED AGAINST CLIFFORD M. WASHBURN, INDIVIDUALLY.

Walter B. House	284.00
Brooks Bros.	227.50
Louis Sherry	30.85
Hotel Knickerbocker	50.50
J. H. Small & Sons	124.00
Total	$716.85

CLAIMS FILED AGAINST ARTHUR C. SHERWOOD, 1353
INDIVIDUALLY.

Shafer & Vorsanger	24.03
E. C. Sherwood	12,131.67
Josephine Richards	160.00
Brooks Bros.	87.00
James Harris	90.70
Total	$12,493.40

1354 Total claims filed against J. M. Fiske & Co. $996,958.74
" " " " Dudley T. Humphrey 440.41
" " " " Clifford M. Washburn 716.85
" " " " Arthur C. Sherwood. 12,493.40

Total Claims Filed..... $1,010,609.30

1355 **Defendants' Exhibit A.**

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain, directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or in any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter
1356 have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:

1.—All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the

deposit account of the undersigned with said Bank 1357
existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2.—Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; and upon the failure of the un- 1358
dersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3.—Upon failure of the undersigned either to pay any indebtedness to said Bank when becom- 1359
ing or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application.

1360 If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. If you default as aforesaid, said Bank may also apply to or on the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said Bank.

1361 J. M. Fiske & Co.

Dated, New York, the 8th day of November, 1901.

1362

Defendants' Exhibit B. 1399

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post-Office Building in the Borough of Manhattan, City of New York, on the 3rd day of May, 1910.

Present—Hon. District Judge.

1400

In the Matter

of

Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood individually and as co-partners doing business under the firm name and style of J. M. Fiske & Company,

Bankrupts.

Upon the annexed petition of Josiah M. Fiske 1401
verified the 2nd day of May, 1910, it is

Ordered that the individual schedules of Josiah M. Fiske and especially "B. (4)" be and it is hereby amended in accordance with the annexed petition and annexed proposed schedule.

Samuel Miller,
Referee in Bankruptcy.

1402 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

DUDLEY T. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C.
1403 SHERWOOD, individually and as co-partners doing business under the firm name and style of J. M. FISKE & COMPANY,

Bankrupts.

The petition of Josiah M. Fiske respectfully shows:

That your petitioner is one of the bankrupts herein and was duly adjudicated such on the 12th day of March, 1910.

1404 That thereafter and in pursuance of an order of this Court the schedules were duly filed, containing both the assets and liabilities of the firm and those of your petitioner. That no trustee has been elected or appointed and no examination of the bankrupt been had.

That in examining Schedule "B. (4)" your petitioner found that he has overlooked a possible interest in the estate of Josiah M. Fiske belonging to your petitioner. That your petitioner desires to amend Schedule "B" 4" so that against the question in such schedule, to-wit:—"Rights and powers, legacies and bequests" instead of answer "None,"

should appear as "A possible contingent interest 1405
in the Estate of Josiah M. Fiske," in which the Trustee may have an interest, the value of said interest being unknown to your petitioner. Annexed hereto is such amended schedule. That no previous application has been made.

Dated, New York, May 2nd, 1910.

JOSIAH M. FISKE.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

JOSIAH M. FISKE, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, that he has read the foregoing petition 1406
and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

JOSIAH M. FISKE.

Sworn to before me this }
2nd day of May, 1910. }
EMANUEL B. COHEN,
Commissioner of Deeds,
New York City, N. Y.

1407

1408

SCHEDULE B (4).

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, including Property held in Trust for the Debtor, or subject to any Power or Right to dispose of or to charge.

General Interest	Particular Description	Supposed Value of my Interest
Interest in Land,	None	
Personal Property.	None	
Property in money, stocks, bonds, annuitions, etc.		
Rights and powers, legacies and bequests.		
1409	A possible contingent interest in the Estate of Josiah M. Fiske	

Property Heretofore Conveyed for Benefit of Creditors.		Amount Realized from Proceeds of Property Conveyed.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise for benefit of creditors date of such deed, name and address of property to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor.	None	
What sums or sums have been paid to counsel, and to whom, for services rendered or to be rendered 1410 in this bankruptcy.	None	

JOSIAH M. FISKE,
Petitioner.

OATH TO SCHEDULE B. 1411

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

IN THE MATTER
OF
J. M. FISKE,
Bankrupt.

On this 2nd day of May, A. D., 1910, before me personally came Josiah M. Fiske, the person mentioned in and who subscribed to the foregoing 1412
Schedule, and who, being by me first duly sworn, did declare the said Schedule to be a statement of all his individual estate, both real and personal, in accordance with the Act of Congress relating to bankruptcy.

JOSIAH M. FISKE.

Subscribed and sworn to before me
this 2nd day of May, A. D. 1910.

EMANUEL B. COHEN,
Commissioner of Deeds,
New York City, N. Y.

1413

Defendants' Exhibit C.

"The undersigned, being desirous of purchasing at least 20,000 shares of the common stock of the COLUMBUS & HOCKING COAL & IRON COMPANY, do hereby agree to purchase the same, or so much thereof as in the opinion of the hereinafter appointed manager may be deemed advisable, in the proportion set opposite the respective names of said subscribers and we hereby appoint James R. Keene our agent and manager to make such purchases at such time or times before the first day of September, 1909, unless sooner dissolved by the majority of the stock sub-

1414 scribed, in such manner and amounts and at such prices as in his judgment shall be to our mutual advantage.

Each one signing this agreement to pay on demand for such of said purchases as his subscription (as near as may be practicable) bears to the whole amount subscribed, as such agent or manager may require. Also return the same amount of certificates or part thereof at any time when called for before the first day of September, 1909, on receiving from the manager the amount paid therefor, with interest at five per cent. per
1415 annum. We further agree on any call from said manager to deliver to said manager the same certificates theretofore delivered to us by him.

Further, we hereby authorize the said agent and manager to sell at his discretion the whole or any part of the certificates purchased and again buy, so buying and selling at his discretion.

It is further agreed that any profits or losses incurred through the purchase and sale of said certificates shall be divided in proportion to the amount subscribed for
1416 by each one signing this agreement. No one signing this agreement shall have the right to call for a statement of accounts growing out of transactions herein authorized, except on the request in writing of 60 per cent. in amount of certificates subscribed.

We hereby agree to reimburse the said agent and manager for any commissions paid by him to such brokers as he may deem advisable to employ in the execution of the herein authorized purchases and sales and such other expenses as he may incur and which to him may seem for the best interests of all parties to this agreement.

This agreement is not to be binding on 1417
the undersigned until certificates for 20,
000 shares are subscribed and thereupon this
agreement shall become operative. Sub-
scriptions beyond this amount may be re-
ceived by the agent and manager up to
30,000 shares.

The original hereof shall be signed by the
manager. Counterparts hereof may be
signed by subscribers and all shall be taken
together and deemed to be one original in-
strument, and upon the agreement becom-
ing operative the manager shall notify the
subscribers.
1418

In Witness Whereof, the parties have
signed this agreement as of March 1st, 1909."

Defendants' Exhibit D.

MARCH 6, 1909.

MESSRS. J. M. FISKE & CO.,
42 Broadway,
N. Y. City.

GENTLEMEN:

I am in receipt of your subscription to 1419
the Columbus & Hocking Coal & Iron Com-
pany Pool Agreement dated March 1, 1909,
for 2,000 shares. Pursuant to the agreement
I desire to notify you that the number of
shares necessary to make the agreement
binding has been subscribed and therefore
the agreement has become operative. Kindly
acknowledge receipt of this notice and
oblige

Yours very truly,
JAMES R. KEENE,
Manager.

1420

Defendants' Exhibit E.

Not printed by agreement.

(See Stipulation, page 271.)

Defendants' Exhibit F.

JULY 14, 1909.

MESSRS. J. M. FISKE & CO.,
42 Broadway,
New York City.

GENTLEMEN:

1421 You have been allotted a four thousand share interest in a twenty thousand share account in the common stock of the Columbus & Hocking Coal & Iron Company, to be managed by myself.

You are to hold yourself in readiness to receive through me your proportionate share of all purchases and to deliver to me as manager the same certificates theretofore delivered by me to you.

I am to buy at my discretion and to sell the whole or any part of the certificates purchased and again buy and sell at my discretion; any profits or losses shall be divided

1422 in proportion to the amount subscribed by each member and the commissions and expenses, if any, shall be borne in like manner.

This account will operate until March 1, 1910.

Kindly acknowledge receipt of this letter, assenting to its terms.

Very truly yours,
(Signed) JAMES R. KEENE.

Defendants' Exhibit G.

Not printed by agreement.

(See Stipulation, pages 271-2.)

Defendants' Exhibit H.

1423

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY, CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, individually, and as co-partners composing the firm of J. M. Fiske & Co., and the firm of J. M. FISKE & CO.,

Plaintiffs,

1424

AGAINST

JAMES R. KEENE; FRANCIS C. BISHOP and WILLIAM LAIMBEER, composing the firm of Bishop, Laimbeer & Co.; OTTO WAGNER, JOHN S. DICKERSON and TRISTRAM R. COFFIN, composing the firm of Wagner, Dickerson & Co.; S. REED ANTHONY, NATHAN ANTHONY, WILLIAM A. TUCKER, PHILIP L. SALTONSTALL, CHAUNCEY ELDRIDGE, composing the firm of Tucker, Anthony & Co.; JOHN B. VAN SCHAICK and DERBY CRANDALL, composing the firm of Van Schaick & Co.; ATTWOOD VIOLETT, ERNST VON MEYSENBUG, ARTHUR TERRY, W. LANIER WASHINGTON, CAMPBELL W. STEWARD and THEODORE B. DEEMS, composing the firm of Attwood Violett & Co.; HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Lathrop, Haskins & Co.; and EDWARD POPPER, ARTHUR W. POPPER, SIDNEY M. STERNBACH and JOSEPH LOEWI, composing the firm of Popper & Sternbach,

1425

Defendants.

The complaint of the plaintiffs, by Hays, Hershfield & Wolf, their attorneys, respectfully shows

1426 to this Court, and alleges, upon information and belief:

I.—That at all of the times hereinafter mentioned, Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood were co-partners in business in the City of New York, under the firm name and style of 'J. M. Fiske & Co.'

II.—That at all of the times hereinafter mentioned, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi were co-partners in business in the City of New York, under
1427 the firm name and style of 'Popper & Sternbach.'

III.—That at all of the times hereinafter mentioned, Francis C. Bishop and William Laimbeer were co-partners in business in the City of New York, under the firm name and style of 'Bishop, Laimbeer & Co.'

IV.—That at all of the times hereinafter mentioned, Otto Wagner, John S. Dickerson and Tristram R. Coffin were co-partners in business in the City of New York, under the firm name and style of 'Wagner, Dickerson & Co.'

1428

V.—That at all of the times hereinafter mentioned, S. Reed Anthony, Nathan Anthony, William A. Tucker, Philip L. Saltonstall and Chauncey Eldridge were co-partners in business in the City of New York, under the firm name and style of 'Tucker, Anthony & Co.'

VI.—That at all of the times hereinafter mentioned, John B. Van Schaick and Derby Crandall, were co-partners in business in the City of New York, under the firm name and style of 'Van Schaick & Co.'

VII.—That at all of the times hereinafter men- 1429
tioned, Attwood Violett, Ernst von Meysenbug, Arthur Terry, W. Lanier Washington, Campbell W. Steward and Theodore B. Deems, were co-partners in business in the City of New York, under the firm name and style of 'Attwood, Violett & Co.'

VIII.—That on March 24th, 1910, Henry S. Haskins and Henry Leverich, individually and as co-partners trading as Lathrop, Haskins & Co., being composed of said individual and general partners, and Fannie G. Lathrop as special partner, were duly adjudicated bankrupts, and at the 1430
first meeting of creditors of said bankrupts duly held on the 18th day of April, 1910, Henry D. Hotchkiss was duly elected Trustee in Bankruptcy of said Henry S. Haskins, Henry Leverich and Lathrop, Haskins & Co., and has duly qualified as such, and has ever since been acting as such Trustee of the goods, assets and effects of the aforesaid bankrupts.

IX.—That heretofore, and on the 19th day of January, 1910, three certain creditors of said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually 1431
and as co-partners composing the firm of J. M. Fiske & Co., and of said firm of J. M. Fiske & Co., duly filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, an involuntary petition in bankruptcy, in pursuance of an Act of Congress, entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,' approved July 1, 1898, and the amendments thereof and thereto, praying that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as co-part-

1432 ners, aforesaid, and said firm, be adjudged bankrupts within the purview of said Act.

X.—That thereafter, and on the 12th day of March, 1910, the prayer of said petitioning creditors was duly granted, and an order of adjudication was duly entered in said bankruptcy proceedings by Hon. Learned Hand, one of the Justices of the District Court of the United States for the Southern District of New York, adjudging that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as co-partners composing the said firm
1433 of J. M. Fiske & Co., and said firm of J. M. Fiske & Co., were bankrupts.

XI.—That thereafter, said proceedings in bankruptcy were duly referred to Hon. Seaman Miller, one of the Referees in Bankruptcy of the District Court of the United States for the Southern District of New York, and in pursuance of such order of reference, and on or about the 5th day of May, 1910, a first meeting of creditors of said bankrupts was duly held as provided by said Act of Congress relating to bankruptcy, at which said meeting the plaintiffs herein were duly appointed and elected Trustees of the estate in bankruptcy
1434 of said bankrupts.

XII.—That thereafter, the appointment of plaintiffs as such Trustees was duly approved, and the bond of said Trustees in the penal sum of $50,000, conditioned upon the faithful performance of their duties as such Trustees, was duly filed and thereafter duly approved both as to form and sufficiency, and an order approving such bond was duly filed, and plaintiffs have ever since been, and still are, acting as the Trustees in bankruptcy of the said bankrupts.

XIII.—That by virtue of the order of their ap- 1435
pointment and the qualification as such trustees, and the provisions of the Act of Congress relating to bankruptcy, the plaintiffs herein, as Trustees, have become vested with all the property of the said bankrupts of whatever kind, nature, character, or description, as of the date that the said bankrupts were adjudicated bankrupts, to wit, March, 12th, 1910, and became vested with all rights of action which creditors of said bankrupts had at the time of the said adjudication in bankruptcy.

XIV.—That heretofore, and on or about the 14th day of July, 1909, an agrement was entered into by 1436
and between the bankrupts composing said firm of J. M. Fiske and Co. and the bankrupts composing the firm of Lathrop, Haskins & Co and the defendants, other than the defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, and the defendant Hotchkiss, as trustee as aforesaid, that the said parties should and did for a good and valuable consideration enter into a joint venture, which should continue until the first day of March, 1910, for the purchase of 20,000 shares of the common stock of the Columbus & Hocking Coal & Iron Co.

XV.—That is was further mutually understood 1437
and agreed by the said parties that the said defendant Keene should act as manager, agent and trustee for the other members of the said joint venture in and for the purchase and sale of said stock, and the said defendant Keene agreed further that he would not, during the term of the said agreement and the operation of the said joint venture, sell any of the stock of the Columbus & Hocking Coal & Iron Co. owned by him, or thereafter acquired by him.

1438 XVI.—That it was further mutually understood and agreed by the said parties that they should and did subscribe to the said undertaking for the purchase of 20,000 shares, and that their interest in the said joint venture should be in the proportion to the said subscription, *viz.*:

Attwood, Violett & Co.....	1,000 shares.
Tucker, Anthony & Co.....	1,000 shares.
Van Schaick & Co.....	1,000 shares.
Wagner, Dickerson & Co....	1,000 shares.
Bishop, Laimbeer & Co.....	1,000 shares.
J. M. Fiske & Co.....	4,000 shares.
1439 James R. Keene.....	4,000 shares.
Lathrop, Haskins & Co.....	7,000 shares.
Total	20,000 shares.

XVII.—That each of the parties to said agreement agreed to hold himself in readiness to receive from the defendant Keene, as manager, agent and trustee for the said joint venture, and as manager, agent and trustee for the said members thereof his proportionate share of all purchases of said stock and upon receipt thereof to pay for the same and thereafter to deliver to the defendant Keene as such manager, agent and trustee, upon demand, the iden-
1440 tical certificates theretofore delivered by the defendant Keene as such manager, agent and trustee.

XVIII.—That thereafter the said parties entered in and upon the execution of the said joint venture through the defendant Keene as agent, manager and trustee, and the defendant Keene made purchases and sales of the said stock as agent and in trust for the parties to said agreement.

XIX.—That thereafter, and prior to the commencement of this action, said defendant Keene continued as agent, manager and trustee for the said

joint venture to buy and sell the said stock for the account of himself, and the said parties to the said agreement. That the entire management and control of said joint venture was vested in and exercised by the defendant Keene, and that large sums of money have come into the possession of defendant Keene as manager, agent and trustee for the said members of the said joint venture, which the defendant Keene has declined and refused to pay to his *cestuis que trust* in the proportion to which they are entitled thereto. 1441

XX.—That the bankrupts composing the firm of J. M. Fiske & Co. have, and the said firm of Fiske & Co. has, duly performed and complied with all the terms, conditions and provisions of said agreement and of said joint venture on their part and on its part to be performed. 1442

XXI.—That the term of the said joint venture has expired, and that no accounting has ever been rendered by the defendant Keene, nor by any of the other parties thereto, to any of the parties hereto, of the transactions of the said joint venture. That the defendant Keene has made large profits in and about the purchase and sale of said stock for the account of the said parties to the said agreement for which he has wholly failed to account and which he has failed to pay over. 1443

XXII.—That the defendant Keene, with intent to defraud the other parties hereto, and in bad faith, and with the intention of making personal profit for himself, and causing a loss to the other members of the said joint venture, secretly and in violation of the provisions of the said agreement, made various purchases and sales of the said stock which resulted in losses to the other members of the said joint venture, and in large profits to himself.

1444 XXIII.—That on or about the 18th and 19th days of January, 1910, the defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, composing the firm of Popper & Sternbach, were brokers for said defendant Keene, and as such brokers held for the account of the said defendant Keene approximately 7,650 shares of Columbus & Hocking Coal & Iron Co. stock, the greater portion thereof being the allotment of the said stock of said defendant Keene in the said joint venture.

XXIV.—That on or about the 18th and 19th days
1445 of January, 1910, the defendant Keene, in direct violation of his agreement with the members of the said joint venture, directed said defendants composing the firm of Popper & Sternbach to sell approximately 6,900 shares of the said stock at prices in advance of the prices at which said stock has since sold, and is now selling.

XXV.—That the said defendants composing the firm of Popper & Sternbach combined with the defendant Keene to sell the said stock, and that it was sold for the account of said defendant Keene and that the defendants composing the firm of Popper
1446 & Sternbach and the defendant Keene realized therefor large sums of money, and that the said stock was sold at prices in advance of the prices at which the said stock has since sold and is now selling.

XXVI.—That said defendants composing the firm of Popper & Sternbach, contend that said sales were made for their own account, and were what is known as 'short' sales, and that in order to make good said sales, they made deliveries of the stock of the defendant Keene which was then in their custody and possession as brokers of said defendant

Keene, and they further contend that any and all profits arising from the said sales and transactions were and are their own property and belong to them, and that the defendant Keene is not entitled thereto, and that the said defendants composing the said firm of Popper & Sternbach still hold and retain said profits and the benefits of said transactions. 1447

XXVII.—That the defendants composing the firm of Popper & Sternbach further contend that in making deliveries of said stock, they acted by permission and authority of the defendant Keene, and that the defendant Keene acquiesced therein and thereto. 1448

XXVIII.—That the sale of said stock, and the delivery thereof, by the defendants composing the firm of Popper & Sternbach, if made for the defendant Keene, was a direct violation by the defendant Keene of his duties and obligations to the parties of the said agrement.

XXIX.—That in any event, said defendant Keene is entitled to demand and collect said profits for the benefit of the parties to the said agreement, but in violation of his said duties and obligations under the said agreement, has wrongfully acquiesced in the said contention of the defendants composing the firm of Popper & Sternbach, and has permitted, and still wrongfully permits, said defendants composing the firm of Popper & Sternbach to retain the said profits derived from said alleged 'short' sales and the benefits of said transactions. 1449

XXX.—That in any event it was the duty and obligation of the defendant Keene to adopt as his own and to ratify said sales of stock made by the defendants composing the firm of Popper & Sternbach

1450 and to demand and collect from said defendants on behalf of, and for the benefit of, the parties to the said agreement, the members of the joint venture aforesaid, all profits accruing and accrued to the defendants composing said firm of Popper & Sternbach by reason of said alleged 'short' sales, and which, as plaintiffs are informed and believe, amount to upwards of $300,000.

XXXI.—That the said parties to the said agreement, the members of the said joint venture, are entitled to the profits earned by the said defendant Keene and defendants composing the firm of Pop-
1451 per & Sternbach upon said alleged 'short' sales of said stock, which plaintiffs verily believe to have been in fact sales ordered made by the defendant Keene in violation of the term and provisions of said agreement.

XXXII.—That the parties hereto other than the defendants composing the firm of Popper & Sternbach are entitled to an accounting from the defendants composing said last-mentioned firm of all profits earned by the said firm upon said alleged 'short' sales of said stock and the deliveries made pursuant thereunder, and, in any event, are entitled
1452 to have the defendants composing said firm account in this action to the defendant Keene for the benefit of all the parties to the said agreement.

XXXIII.—That the said defendant Keene still has and retains in his possession, profits and property of the said joint venture and its members, and that no accounting has ever been had between any of the parties hereto of the affairs of the said joint venture.

XXXIV.—That plaintiffs have no adequate remedy at law.

XXXV.—That leave has been given this suit by order duly obtained of the United States District Court for the Southern District of New York. 1453

Wherefore plaintiffs pray:

(1) That there be an accounting decreed between the parties hereto of the affairs of the said joint venture.

(2) That the rights of the parties hereto in and to the funds of the said joint venture and the profits thereof be determined.

(3) That the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs, and to the defendants herein, other than the defendants composing the firm of Popper, Sternbach & Co., for said profits by reason of his unauthorized permission to the said defendants, Popper & Sternbach, to make said alleged 'short' sales. 1454

(4) That in addition thereto, the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs and to the defendants herein other than the defendants composing the firm of Popper & Sternbach for any and all other sales and purchases made by him of the said stock.

1455

(5) That the plaintiffs on their own behalf, and on behalf of the defendants other than defendant Keene and defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, composing the firm of Popper & Sternbach, have judgment against said defendant Keene for the damages sustained by reason of the violations of said agreement on the part of the said defendant Keene.

(6) That the defendants, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph

1456 Lewis, composing the firm of Popper & Sternbach, be ordered, adjudged and decreed to account to the plaintiffs, and to the other defendants herein, or to the defendant Keene for the benefit of the plaintiffs and the defendants herein other than the defendants composing the firm of Popper & Sternbach, for any and all profits earned, or to be earned, by the said defendants composing the said firm of Popper & Sternbach, upon said alleged 'short' sales of stock of the Columbus & Hocking Coal & Iron Co.

And that the plaintiffs may have such other and further relief as to the Court may seem just and
1457 proper, together with the costs of this action.

HAYS, HERSHFIELD & WOLF,
Attorneys for Plaintiff,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

City and County of New York, ss.:

BRUCE L. ERNST, being duly sworn, says that he is one of the plaintiffs in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own
1458 knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BRUCE L. ERNST.

Sworn to before me this
28th day of May, 1920.
ELI M. COHEN,
Notary Public,
New York County.

Defendants' Exhibit L.

1459

N. Y. SUPREME COURT.

IRVING L. ERNST, and others as Trustee, etc., of J. M. Fiske & Co.,

AGAINST

JAMES R. KEENE and others.

Action No. 1.

The separate answer of James R. Keene, one of the defendants to the complaint of the plaintiffs in the above entitled action. 1460

UPON INFORMATION AND BELIEF.

FIRST.—The said defendant answering the said complaint denies that he has any knowledge or information sufficient to form a belief of the allegations contained in the paragraphs of said complaint numbered from I to XIII, both inclusive, and XXXV.

The said defendant denies the allegations contained in the paragraphs of said complaint numbered from XVI to XXV, both inclusive, and XXVIII to XXXIV, both inclusive. He admits and alleges however: 1462

That said plaintiffs represent those constituting the late firm of J. M. Fiske & Company;

That heretofore, to wit, on or about the 14th day of July, 1909, an agreement in writing was entered into between this defendant and the firms of Atwood Violett & Company, Tucker, Anthony & Company, Van Schaick & Company, Wagner, Dickerson & Company, Bishop, Laimbeer & Company, J. M. Fiske & Company, and Lathrop, Haskins & Company.

1462 That the said agreement so entered into was expressed in letters addressed to each of said parties, all being of the same tenor and date except as to the name of the addressee and the number of shares allotted, one of which letters was as follows:

"JULY 14, 1909.

MESSRS. VAN SCHAICK & Co.,
No. 7 Wall Street,
New York City.

GENTLEMEN:

1463 You have been allotted a one thousand share interest in a twenty thousand share account in the common stock of the Columbus & Hocking Coal & Iron Company, to be managed by myself.

You are to hold yourself in readiness to receive through me your proportionate share of all purchases and to deliver to me as manager the same certificates thereto[illegible] delivered by me to you.

I am to buy at my discretion and to sell the whole or any part of the certificates purchased and again buy and sell at my discretion; any profits or losses shall be divided

1464 in proportion to the amount subscribed by each member and the commissions and expenses, if any, shall be borne in like manner.

This account will operate until March 1, 1910.

Kindly acknowledge receipt of this letter, assenting to its terms.

Very truly yours,

(Signed) JAMES R. KEENE."

That the several addressees of said letters, all of whom accepted and agreed to the terms thereof and

the numbers of shares in respect to which they sev- 1465
erally became bound, were as follows:

Atwood Violett & Co.	1,000 shares
Tucker, Anthony & Co.....	1,000 "
Vam Schaick & Co.	1,000 "
Waggner, Dickerson & Co....	1,000 "
Bishop, Laimbeer & Co.....	1,000 "
J. M. Fiske & Co.....	4,000 "
Lathrop, Haskins & Co.....	7,000 "
James R. Keene.....	4,000 "
Total 20,000	"

That not only was there intentionally omitted 1466
from the said agreement any provision limiting the right of tthe subscribers to deal in the said stock as they should see fit, but it was expressly understood and agreed by the subscribers that this defendant and every other subscriber should be free to sell any stock he might own, and conduct such other operations in the said stock for his own account as he should see fit, save and except that the certificates representing distributions of pool stock should be held subject to call.

That in the relation created by the said written agreement and the said understanding and agree- 1467
ment as to the right of this defendant and the other members of said pooling arrangement to conduct individual operations in the said stock and not otherwise, this defendant proceeded to acquire and distribute stock for said pool and to re-sell the same from time to time until shortly before January 29, 1910; and that incidentally this defendant and said firm of Lathrop, Haskins & Co. together for their joint account and separately for the individual account conducted operations in said stock as they had a perfect right to do, and as was done by the other members of the pooling arrangement; that as to the 7,000 shares of the said stock which

1468 were owned by this defendant on the 9th day of March, 1909, all of the same with the exception of 800 shares had been sold long prior to the formation of the said pooling arrangement.

That the term of the arrangement covered by the said agreement has expired.

The said defendant admits the allegations contained in the paragraphs of said complaint numbered XXVI and XXVII.

The said defendant denies each and every allegation in the said complaint contained not hereinbefore specifically admitted or denied.

1469 SECOND.—For a further separate and distinct complete defense to the entire pretended cause of action alleged in the said complaint, and as a counterclaim thereto, the said defendant relying upon the allegations, admissions and specific denials in the preceding defenses contained, in the same manner as if the same were here repeated at length, further answering alleges:—

That the said firm of J. M. Fiske & Co broke the agreement hereinabove admitted to have been made in the following particulars, that is to say, by recklessly entering upon and prosecuting speculations in said stock of a magnitude out of all proportion
1470 to their financial resources; and by conducting as brokers for and promoting in the conducting by other brokers for irresponsible individuals of important operations in said stock on slender margins and in some cases without margins, whereby the parties to said pooling arrangement, including this defendant, were placed in a position of grave peril through the inability of said J. M. Fiske & Co., and their customers and associates outside of said pooling arrangement to sustain the effect of any important recession in the market price of said stock; all of which wrongful acts and omissions tended directly toward precipitating and on the

19th day of January, 1910, did precipitate a disas- 1471
trous panic and the fall of the market price of said stock from about $88 per share to about $15 per share, to the damage of this defendant in the sum of $250,000.

SOLOMON HANFORD,
41 Wall Street, Manhattan,
New York City,
Attorney for said defendant.

County of New York, ss.:

SOLOMON HANFORD, being duly sworn, says that he is the attorney for the defendant named in the foregoing answer; that said answer is true to the knowledge of deponent except as to the matters 1472
therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that said defendant is not within the said county of New York in which deponent resides; and that the grounds of deponent's belief as to all matters not stated upon his knowledge are communications made to deponent by said defendant.

Sworn before me this 21st day of October, 1910.

S. HANFORD.

HENRY B. POGSON,
Notary Public,
New York County. 1473

1474 **Defendants' Exhibit J.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY; CLIFFORD M. WASHBURN, JOSIAH M. FISKE and ARTHUR C. SHERWOOD, individually, and as copartners composing the firm of J. M. Fiske & Co., and the firm
1475 of J. M. Fiske & Co.,

Plaintiffs,

AGAINST

JAMES R. KEENE, ALFRED H. NEWBURGER, FRANK L. NEWBURGER, SAMUEL M. NEWBURGER, LESTER M. NEWBURGER, JOHN J. HENDERSON, HORACE LOEB and JACOB F. LOEB, composing the firm of Newburger, Henderson & Loeb; CHARLES E. ORVIS, EDWIN W. ORVIS and ASHTON C. LAWRENCE, composing the firm of Orvis Brothers & Co.; GEORGE B. POST, JR., ARTHUR TURNBULL, BENSON B. SLOAN, HENRY SHAW, NEVILLE C. HIGHAM, NATHANIEL
1476 L. McCREADY and ALFRED L. DENNIS, composing the firm of Post & Flagg; and CHARLES H. JE[illegible], JR., EDWARD H. JEWETT, GEORGE W. JEWETT, RICHARD B. WHITTEMORE and ALPHEUS REHBEIN, composing the firm of Jewett Brothers; GEORGE PARMLY DAY, THATCHER M. ADAMS, JR., THOMAS LUDLOW CLARKE, CLARENCE S. DAY, THATCHER M. ADAMS and JULIAN DAY, composing the firm of Day, Adams & Co.; HARRY MARKOE, JR., ROBERT MORISON and HARRY L. BLOODGOOD, composing the firm of Markoe & Morison; ALBERT J. ELIAS and HENRY H.

ELIAS, composing the firm of A. J. Elias & Co.; EDWARD A. ROLLINS, WARREN F. ROLLINS and ADOLPH C. ROLLINS, composing the firm of Rollins & Co.; HENRY D. HOTCHKISS, as Trustee in Bankruptcy of Lathrop, Haskins & Co.; and EDWARD POPPER, ARTHUR W. POPPER, SIDNEY M. STERNBACH and JOSEPH LOEWI, composing the firm of Popper & Sternbach,
Defendants. 1477

The complaint of the plaintiffs, by Hays, Hershfield & Wolf, their attorneys, respectfully shows to this Court and alleges, upon information and belief: 1478

I—That at all of the times hereinafter mentioned Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood were copartners in business in the City of New York, under the firm name and style of 'J. M. Fiske & Co.'

II.—That at all of the times hereinafter mentioned, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, were copartners in business in the City of New York, under the firm name and style of 'Popper & Sternbach.'

III.—That at all of the times hereinafter mentioned, Alfred H. Newburger, Frank L. Newburger, Samuel M. Newburger, Lester M. Newburger, John J. Henderson, Horace Loeb and Jacob F. Loeb, were copartners in business in the City of New York, under the firm name and style of 'Newburger, Henderson & Loeb.' 1479

IV.—That at all of the times hereinafter mentioned, Charles E. Orvis, Edwin Orvis and Ashton C. Lawrence, were copartners in business in the City of New York, under the firm name and style of 'Orvis Brothers & Co.'

1480 V.—That at all of the times hereinafter mentioned, George B. Post, Jr., Arthur Turnbull, Benson B. Sloan, Henry Shaw, Neville H. Higham and Alfred L. Dennis, were copartners with Nathaniel L. McCready in business in the City of New York, under the firm name and style of 'Post & Flagg.'

VI.—That at all of the times hereinafter mentioned, Charles H. Jewett, Jr., Edward H. Jewett, George W. Jewett, Richard B. Whittemore and Alpheus Rehbein, were copartners in business in the City of New York, under the firm name and style of 'Jewett Brothers.'

1481

VII.—That at all of the times hereinafter mentioned, George Parmly Day, Thatcher M. Adams, Jr., Thomas Ludlow Clarke and Julian Day, were copartners, with Clarence S. Day and Thatcher M. Adams as special partners, in business in the City of New York, under the firm name and style of 'Day, Adams & Co.'

VIII.—That at all of the times hereinafter mentioned, Harry Markoe, Jr., Robert Morison and Harry L. Bloodgood, were copartners in business in the City of New York, under the firm name and
1482 style of 'Markoe & Morison.'

IX.—That at all of the times hereinafter mentioned, Albert J. Elias and Henry H. Elias were copartners in business in the City of New York, under the firm name and style of 'A. J. Elias & Co.'

X.—That at all of the times hereinafter mentioned, Edward A. Rollins, Warren F. Rollins and Adolph C. Rollins, were copartners in business in the City of New York, under the firm name and style of 'Rollins & Co.'

XI.—That on March 24th, 1910, Henry S. Has- 1483
kins and Henry Leverich, individually and as co-
partners, trading as Lathrop, Haskins & Co., be-
ing composed of said individual and general part-
ners, and Fannie G. Lathrop as special partner,
were duly adjudicated bankrupts, and at the first
meeting of creditors of said bankrupts duly held on
the 18th day of April, 1910, Henry D. Hotchkiss
was duly elected Trustee in Bankruptcy of said
Henry S. Haskins, Henry Leverich and Lathrop,
Haskins & Co. and duly qualified as such, and has
ever since been acting as such Trustee of the goods,
assets and effects of the aforesaid bankrupts.

1484

XII.—That heretofore, and on the 19th day of
January, 1910, three certain creditors of said Dud-
ley P. Humphrey, Clifford M. Washburn, Josiah
F. Fiske and Arthur C. Sherwood, individually,
and as copartners composing the firm of J. M. Fiske
& Co., and of said firm of J. M. Fiske & Co., duly
filed in the office of the Clerk of the District Court
of the United States for the Southern District of
New York, an involuntary petition in bankruptcy,
in pursuance of an Act of Congress entitled, 'An
Act to Establish a Uniform System of Bankruptcy
throughout the United States,' approved July 1,
1898, and the amendments thereof and thereto,
praying that the said Dudley P. Humphrey, Clif- 1485
ford M. Washburn, Josiah M. Fiske and Arthur
C. Sherwood, individually, and as copartners afore-
said, and said firm, be adjudged bankrupts within
the purview of said Act.

XIII.—That thereafter, and on the 12th day of
March, 1910, the prayer of said petitioning credi-
tors was duly granted and an order of adjudication
was duly entered in said bankruptcy proceedings
by Hon. Learned Hand, one of the Justices of the
District Court of the United States for the South-

1486 ern District of New York, adjudging that the said Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually, and as copartners composing the firm of J. M. Fiske & Co., and the said firm of J. M. Fiske & Co., were bankrupts.

XIV.—That thereafter, said proceedings in bankruptcy were duly referred to Hon. Seaman Miller, one of the Referees in Bankruptcy of the District Court of the United States for the Southern District of New York, and in pursuance of such order of reference, and on or about the 5th day
1487 of May, 1910, a first meeting of creditors of said bankrupts, was duly held as provided by said Act of Congress relating to bankruptcy, at which said meeting the plaintiffs herein was duly appointed and elected Trustees of the estate in bankruptcy of said bankrupts.

XV.—That thereafter, the appointment of plaintiffs as such Trustees, was duly approved, and the bond of said Trustees in the penal sum of $50,000 conditioned upon the faithful performance of their duties as such Trustees, was duly filed and thereafter duly approved both as to form and sufficiency,
1488 and an order approving such bond was duly filed and plaintiffs have ever since been, and still are, acting as the Trustees in bankruptcy of the said bankrupts.

XVI.—That by virtue of the order of their appointment and their qualification as such Trustees, and the provisions of the Act of Congress relating to bankruptcy, the plaintiffs herein, as trustees, have become vested with all the property of the said bankrupts of whatever kind, nature, character, or description, as of the date that the said

bankrupts were adjudicated bankrupts, to wit: 1489
March 12th, 1910, and became vested with all rights of action which creditors of said bankrupts had at the time of the said adjudication in bankruptcy.

XVII.—That heretofore, and on or about the first day of March, 1909, the bankrupts composing said firms of J. M. Fiske & Co. and Lathrop, Haskins & Co., and the defendants other than defendants Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, and defendant Hotchkiss, as Trustee as aforesaid, entered into an agreement that the said parties should and did for good and valuable consideration enter into 1490
a joint venture which should continue until the first day of September, 1909, for the purchase of 20,000 shares of the common stock of the Columbus & Hocking Coal & Iron Co. A copy of the form of said agreement is hereto attached, marked 'Exhibit A,' and is hereby made a part hereof.

XVIII.—That it was mutually understood and agreed by the said parties that the said defendant Keene should act as manager, agent and Trustee for the other members of the said joint venture in and for the purchase and sale of said stock, and the said defendant Keene agreed further that he 1491
would not, during the term of the said agreement and the continuance of the operation of the said joint venture, sell any of the stock of the Columbus & Hocking Coal & Iron Co. owned by him, or thereafter acquired by him.

XIX.—That it was further mutually understood and agreed by the said parties, that they should and did subscribe to the said undertaking for the purchase of 20,000 shares, and that their interest

1492 in the said joint venture should be in the proportion to the said subscription, viz.:

J. M. Fiske & Co.	2,000	shares.
Newburger, Henderson & Loeb	500	"
Orvis Bros. & Co.	1,000	"
Post & Flagg	1,000	"
Jewett Brothers	1,000	"
Day, Adams & Co.	3,000	"
Markoe & Morison	1,000	"
A. J. Elias & Co.	1,000	"
Lathrop, Haskins & Co.	5,000	"
Rollins & Co.	1,000	"
1493 James R. Keene	3,500	"
Total	20,000	shares.

XX.—That thereafter, and in or about the month of July, 1909, it was mutually understood and agreed by and between the parties to the said agreement that the same should be continued in force up to the first day of March, 1910, saving and excepting the following: That the defendants composing the firm of Post & Flagg, and the defendants composing the firm of Orvis Brothers & Co., were to withdraw from the said joint venture on or
1494 about the first day of September, 1909, and that they did so withdraw, and the subscription of the defendants composing the firm of Day, Adams & Co. in the said joint venture, and their interest therein, should, on the first day of September, 1909, be reduced from 3,000 to 2,000 shares, and that said interest was so reduced, and it was further mutually understood and agreed by the parties to the said agreement that the same with the said exceptions be continued in full force and effect up to the first day of March, 1910, and that the several interests of the said parties in the said joint venture

should be and were, after the first day of September, 1909, as follows: 1495

J. M. Fiske & Co.	2,000	shares.
Newburger, Henderson & Loeb	500	"
Jewett Brothers	1,000	"
Day, Adams & Co.	2,000	"
Total	17,000	shares
Markoe & Morison	1,000	"
A. J. Elias & Co.	1,000	"
Brought forward	7,500	shares
Brought forward	7,500	shares
Lathrop, Haskins & Co.	5,000	" 1496
Rollins & Co.	1,000	"
James R. Keene	3,500	"
Total	17,000	shares

XXI.—That each of the parties to said agreement agreed to hold himself in readiness to receive from the defendant Keene, as such manager, agent and Trustee, his proportionate share of all purchases and upon receipt thereof to pay for same and thereafter to deliver to defendant Keene as such manager, agent and Trustee, upon demand, the identical certificates theretofore delivered by the defendant Keene as such manager, agent and Trustee. 1497

XXII.—That on or about the 1st day of March, 1909, the said parties to the said agreement entered in and upon the execution of the said joint venture through the defendant Keene as agent, manager and Trustee, and the defendant Keene made purchases and sales of the said stock as agent and in trust for the said parties.

XXIII.—That thereafter, and prior to the commencement of this action, defendant Keene continued as agent, manager and trustee for the said

1498 parties to the said joint venture to buy and sell the said stock for the account of himself, and the said parties to the said agreement. That the entire management and control of said joint venture was vested in and exercised by the defendant Keene, and that large sums of money have come into the possession of defendant Keene as manager, agent and trustee for the said members of the said joint venture, which the defendant Keene has declined and refused to pay to his *cestuis que trust* in the proportion to which they are entitled thereto.

XXIV.—That the bankrupts composing the firm of J. M. Fiske & Co. have and the said firm of J. M.
1499 Fiske & Co. has duly performed and complied with all the terms, conditions and provisions of said agreement and of said joint venture on their part and on its part to be performed.

XXV.—That the term of the said joint venture has expired, and that no accounting has ever been rendered by the said defendant Keene, nor by any of the other parties thereto, to any of the parties hereto, of the transactions of the said joint venture. That the said defendant Keene has made large profits in and about the purchase and sale of said stock for the account of the said parties to the said agreement for which he has wholly failed to account and which he has failed to pay over.
1500

XXVI.—That the defendant Keene, with intent to defraud the other parties hereto, and in bad faith, and with the intention of making personal profit for himself, and causing a loss to the other members of the said joint venture, secretly and in violation of the provisions of the said agreement, made various purchases and sales of the said stock which resulted in losses to the other members of the said joint venture, and in large profits to himself.

XXVII.—That on or about the 18th and 19th days of January, 1910, the defendants composing the

firm of Popper & Sternbach, were brokers for said 1501
defendant Keene, and as such brokers held for the account of the said defendant Keene approximately 7,650 shares of Columbus & Hocking Coal & Iron Co. stock, the greater portion thereof being the allotment of the said stock of said defendant Keene in the said joint venture.

XXVIII.—That on or about the 18th and 19th days of January, 1910, the defendant Keene, in direct violation of his agreement with the members of the said joint venture, directed said defendants composing the firm of Popper & Sternbach, to sell approximately 6,900 shares of the said stock, realizing therefor sums of money largely in advance of 1502
the price at which said stock has since sold, and is now selling.

XXIX.—That the said defendants composing the firm of Popper & Sternbach, combined with the defendant Keene to sell the said stock, and that it was sold for the account of said defendant Keene, and that the defendants composing the firm of Popper & Sternbach, and the defendant Keene realized therefor large sums of money and that the said stock was sold at prices in advance of the prices at which the said stock has since sold and is now selling.

XXX.—That defendants composing the firm of Popper & Sternbach, contend that said sales were 1503
made for their own account, and were what is known as 'short' sales, and that in order to make good said sales, they made deliveries of the stock of the defendant Keene which was then in their custody and possession as brokers of said defendant Keene, and they further contend that any and all profits arising from the said sales were and are their own property and belong to them, and that the defendant Keene was not entitled thereto. That said defendants composing the firm of Popper & Sternbach, still hold and retain the said profits and the benefits of said transactions.

1504 XXXI.—That the defendants composing the firm of Popper & Sternbach further contend that in making deliveries of said stock, they acted by permission and authority of the defendant Keene, and that the defendant Keene acquiesced therein and thereto.

XXXII.—That the sale of said stock, and the delivery thereof, by the defendants composing the firm of Popper & Sternbach, if made for the defendant Keene, was a direct violation by the defendant Keene of his duties and obligations to the parties to the said agreement.

1505 XXXIII.—That in any event, said defendant Keene is entitled to demand and collect said profits for the benefit of the parties to the said agreement, but in violation of his said duties and obligations under the said agreement, has wrongfully acquiesced in the said contention of the defendants composing the firm of Popper & Sternbach, and has permitted, and still wrongfully permits, said defendants composing the firm of Popper & Sternbach, to retain the said profits derived from said alleged 'short' sales and the benefits of said transactions.

XXXIV.—That in any event it was the duty and obligation of the defendant Keene to adopt and to
1506 ratify said sales of stock made by the defendants composing the firm of Popper & Sternbach, and to demand and collect from said defendants on behalf of, and for the benefit of, the parties to the said agreement, the members of the joint venture aforesaid, all profits accruing and accrued to said Popper & Sternbach, by reason of said alleged 'short' sales, the profits of which amount to upwards of $300,000.

XXXV.—That the said parties to the said agreement, the members of the said joint venture, are entitled to the profits earned by the said defendant Keene and the defendants composing the firm of

Popper & Sternbach, upon said alleged 'short' sales of said stock, which plaintiffs verily believe to have been in fact sales ordered made by the defendant Keene in violation of the terms and provisions of said agreement. 1507

XXXVI.—That the parties hereto other than the defendants composing the firm of Popper & Sternbach are entitled to an accounting from the defendants composing said last mentioned firm of all profits earned by the said firm upon said alleged 'short' sales of said stock and the deliveries made pursuant thereunder, and, in any event, are entitled to have the defendants composing said firm account in this action to the defendant Keene for the benefit of all the parties to the said agreement. 1508

XXXVII.—That the said defendant Keene still has and retains in his possession, profits and property of the said joint venture and its members, and that no accounting has ever been had between any of the parties hereto of the affairs of the said joint venture.

XXXVIII.—That leave has been given this suit by order, duly obtained, of the United States District Court for the Southern District of New York.

XXXIX.—That plaintiffs have no adequate remedy at law. 1509

Wherefore plaintiffs pray:

(1) That there be an accounting decreed between the parties hereto of the affairs of the said joint venture.

(2) That the rights of the parties hereto in and to the funds of the said joint venture and the profits thereof be determined.

(3) That the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs, and

1510 to the defendants herein, other than the defendants composing the firm of Popper, Sternbach & Co., for profits realized by reason of his unauthorized permission to the defendants composing the firm of Popper & Sternbach to make said alleged 'short' sales.

(4) That in addition thereto, the defendant Keene be ordered, adjudged and decreed to account to the plaintiffs and to the defendants herein, other than the defendants composing the firm of Popper & Sternbach, for any and all other sales and purchases made by him of the said stock.

(5) That the plaintiffs on their own behalf, and
1511 on behalf of the defendants other than defendant Keene and defendants composing the firm of Popper & Sternbach, have judgment against said defendant Keene for the damages sustained by reason of the violations of said agreement on the part of the said defendant Keene.

(6) That the defendants, Edward Popper, Arthur W. Popper, Sidney M. Sternbach and Joseph Loewi, composing the firm of Popper & Sternbach, be ordered, adjudged and decreed to account to the plaintiffs, and to the other defendants herein, or to the defendant Keene for the benefit of the plaintiffs and the defendants herein, other than the defendants composing the firm of Popper & Sternbach, for any
1512 and all profits earned, or to be earned, by the said defendants composing the firm of Popper & Sternbach upon said alleged 'short' sales of stock of the Columbus & Hocking Coal & Iron Co.

And that the plaintiffs may have such other and further relief as to the Court may seem just and proper, together with the costs of this action.

HAYS, HERSHFIELD & WOLF,
Attorneys for Plaintiff,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

City and County of New York, ss: 1513

IRVING L. ERNST, being duly sworn, says that he is one of the plaintiffs in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

IRVING L. ERNST.

Sworn to before me this 28 day of July, 1910.

ELI M. COHEN,
Notary Public,
New York County.

1514

EXHIBIT A.

'The undersigned, being desirious of purchasing at least 20,000 shares of the common stock of the Columbus & Hocking Coal & Iron Company, do hereby agree to purchase the same, or so much thereof as in the opinion of the hereinafter appointed managers may be deemed advisable, in the proportion set opposite the respective names of said subscribers and we hereby appoint James R. Keene our agent and manager to make such purchases at such time or times before the first day of September, 1909, unless sooner desolved by the majority of 1515
the stock subscribed, in such manner and amounts and at such prices as in his judgment shall be to our mutual advantage.

Each one signing this agreement to pay on demand for so much of said purchases as his subscription (as near as may be practicable) bears to the whole amount subscribed, as such agent or manager may require. Also to return the same amount of certificates or part thereof at any time when called for before the first day of September, 1909, on receiving from the manager the amount paid therefor,

with interest at five per cent. per annum. We further agree on any call from said manager to deliver to said manager the same certificates theretofore delivered to us by him.

Further, we hereby authorize the said agent and manager to sell at his discretion the whole or any part of the certificates purchased and again buy, so buying and selling at his discretion.

It is further agreed that any profits or losses incurred through the purchase and sale of said certificates shall be divided in proportion to the amount subscribed for by each one signing this agreement. No one signing this agreement shall have the right to call for a statement of accounts growing out of transactions herein authorized, except on the request in writing of 60 per cent. in amount of certificates subscribed.

We hereby agree to reimburse the said agent and manager for any commissions paid by him to such brokers as he may deem advisable to employ in the execution of the herein authorized purchases and sales and such other expenses as he may incur and which to him may seem for the best interests of all parties to this agreement.

This agreement is not to be binding on the undersigned until certificates for 20,000 shares are subscribed and thereupon this agreement shall become operative. Subscriptions beyond this amount may be received by the agent and manager up to 20,000 shares.

The original hereof shall be signed by the manager. Counterparts hereof may be signed by subscribers and all shall be taken together and deemed to be one original instrument, and upon the agreement becoming operative the manager shall notify the subscribers.

In Witness Whereof, the parties have signed this agreement as of March 1st, 1909.

Manager.'

Defendants' Exhibit K. 1519

N. Y. SUPREME COURT.

IRVING L. ERNST and others as Trustees, Etc., of J. M. Fiske & Co.

AGAINST

JAMES R. KEENE, and others

Action No. II.

1520

The separate answer of James R. Keene one of the defendants to the complaint of the plaintiffs in the above entitled action.

UPON INFORMATION AND BELIEF.

FIRST.—The said defendant answering the said complaint denies that he has any knowledge or information sufficient to form a belief of the allegations contained in the paragraphs of said complaint designated I to XVI, both inclusive, XIX, XXXVIII and XXXIX.

The said defendant admits the allegations contained in the paragraphs of said complaint desig- 1521
nated XVII, XXX and XXXI.

The said defendant denies the allegations contained in the paragraphs of said complaint designated XVIII to XXIX, both inclusive, and XXXII to XXXVII, both inclusive. He admits and alleges however:

That said plaintiffs represent those constituting the late firm of J. M. Fiske & Company;

That the written agreement mentioned in the complaint was subscribed by the parties and in the amounts stated in paragraph XIX;

1522 That the term of the arrangement covered by the said agreement was in July, 1909, extended to March 1, 1910, with the changes of parties in interest stated in paragraph XX.

That not only was there intentionally omitted from the said agreement any provision limiting the right of the subscribers to deal in the said stock as they should see fit, but it was expressly understood and agreed by the subscribers that this defendant and every other subscriber should be free to sell any stock he might own, and conduct such other operations in the said stock for his own account as he should see fit, save and except that the certificates representing distributions of pool stock should
1523 be held subject to call;

That in the relation created by the said written agreement and the said understanding and agreement as to the right of this defendant and the other subscribers to conduct individual operations in the said stock and not otherwise this defendant proceeded to acquire and distribute stock for said pool and to resell the same from time to time; and that incidentally this defendant and the firm of Lathrop, Haskins & Co. together for their joint account and separately for their individual account, conducted operations in said stock as they had a perfect right to do, and as was done by the other subscribers to the pooling arrangement; that this proceeded until
1524 about the 23rd day of April 1909 at which time all of the pool stock previously purchased had been sold and all of the 7,000 shares of stock held by this defendant prior to the making of said agreement had also been sold with the exception of 800 shares; that the pool operations so conducted by this defendant had netted to the pool members on their subscriptions profits aggregating over $250,000 which had been in no way whatever diminished or in any way affected otherwise than favorably by the individual operations of this defendant including the sale of 6,200 shares of his said original holdings of 7,000 shares of said stock;

That prior to and after the said 23rd day of April, 1525
1909, not only this defendant and the said firm of Lathrop, Haskins & Co., but as this defendant is informed and believes, the said firm of J. M. Fiske & Co. and every one of the other subscribers to the said pool agreement, had alone and jointly with other persons conducted individual operations in the said stock, some of the said subscribers, including said Lathrop, Haskins & Co., and J. M. Fiske & Co., having organized unknown to this defendant until long afterwards, various independent associations or pools for speculating in said stock;

That on or about the said 23rd day of April, 1909, having disposed of all of the pool stock previously purchased and all of his said individual holdings of 1526
7,000 shares except 800 shares, with a resultant profit to the pool members of over $250,000 as aforesaid, this defendant announced his judgment of the wisdom of either abandoning or at least suspending further pool operations believing that the market price of the stock which had then reached about $66 per share would probably recede and that the stock which had been sold could be reacquired later if desired at a lower price; that thereupon the said pool was sold out and dissolved by the majority of the stock subscribed in such manner and amounts and at such prices as in this defendant's judgment was to the mutual advantage of the parties to said agreement;

That the term of the arrangement covered by the 1527
said agreement has expired.

The said defendant further answering denies each and every allegation in the said complaint contained not hereinbefore specifically admitted or denied.

SECOND.—For a further, separate and distinct complete defense to the entire pretended cause of action alleged in the said complaint, the said defendant relying upon the allegations, admissions and specific denials in the preceding defense contained, in the

same manner as if the same were here repeated at length, further answering, alleges:

That by the written agreement mentioned in the complaint it was expressly provided that "No one signing this agreement shall have the right to call for a statement of accounts growing out of transactions herein authorized except on the request in writing of 60 per cent. in amount of certificates subscribed," and that no such request as that required by the said provision of said agreement has been made.

THIRD.—For a further separate and distinct complete defense to the entire pretended cause of action alleged in the said complaint, and as a counterclaim thereto, the said defendant relying upon the allegations, admissions and specific denials in the preceding defenses contained, in the same manner as if the same were here repeated at length, further answering alleges:—

That the said firm of J. M. Fiske & Co. broke the agreement hereinabove admitted to have been made in the following particulars, that is to say, by recklessly entering upon and prosecuting speculations in said stock of a magnitude out of all proportion to their financial resources; and by conducting as brokers for and promoting in the conducting by other brokers for irresponsible individuals of important operations in said stock on slender margins and in some cases without margins, whereby the parties to said pooling arrangement, including this defendant, were placed in a position of grave peril through the inability of said J. M. Fiske & Co., and their customers and associates outside of said pooling arrangement to sustain the effect of any important recession in the market price of said stock; all of which wrongful acts and omissions tended directly toward precipitating and on the 19th day of January, 1910, did precipitate a disastrous panic and the fall of the market price of said stock from about $88 per share

to about $15 per share, to the damage of this de- 1531
fendant in the sum of $250,000.

SOLOMON HANFORD,
41 Wall St. (Manhattan),
New York City,
Attorney for said Defendant.

County of New York, ss:

SOLOMON HANFORD, being duly sworn, says that he is the attorney for the defendant named in the foregoing answer; that said answer is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that said defendant is not within the said 1532
County of New York in which deponent resides; and that the grounds of deponent's belief as to all matters not stated upon his knowledge are communications made to deponent by said defendant.

S. HANFORD.

Sworn to before me this 22nd day of October, 1910.

HENRY B. POGSON,
Notary Public,
New York County.

1533

1534 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST and others, as Trustees of Dudley P. Humphrey *et al.*,
Plaintiffs, Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY
1535 OF NEW YORK,
Defendant, Appellant.

The within, embraced within the foregoing pages numbered from 1 to 511, inclusive, and contained in two volumes, are true copies of the testimony, exhibits, pleadings, court orders, &c., composing the entire Record on Appeal herein.

Dated, New York, March 30, 1912.

HAYS, HERSHFIELD & WOLF,
Solicitors for Plaintiffs, Appellees.

JOLINE, LARKIN & RATHBONE,
1536 Solicitors for Defendant, Appellant.

DISTRICT COURT OF THE UNITED STATES, 1537

SOUTHERN DISTRICT OF NEW YORK.

IRVING L. ERNST and others, as Trustees of Dudley P. Humphrey *et al*,
Plaintiffs, Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant, Appellant. 1538

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of such portions of the record of the District Court in the above entitled cause as it is stipulated between counsel shall constitute the entire Record on Appeal herein.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereto affixed at the City of 1539
New York, in the Southern District of New York, this 30th day of March, in the year of our Lord One thousand nine hundred and twelve, and of the Independence of the said United States the One hundred and thirty-sixth

THOMAS ALEXANDER,
Clerk.

[SEAL.]

United States Circuit Court of Appeals for the Second Circuit, October Term, 1912.

Argued November 14, 1912; Decided December 9, 1912.

NOVEMBER 18, 1912.

No. 55-127.

IRVING L. ERNST et al., as Trustees, etc., Complainants-Appellees,
vs.
THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant-Appellant.

Before Lacombe, Coxe, and Ward, Circuit Judges.

HENRY D. HOTCHKISS, as Trustee, etc., Complainant-Appellant,
vs.
THE NATIONAL CITY BANK OF NEW YORK, Defendant-Appellant.

Before Lacombe, Ward, and Noyes, Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York.

WARD, *Circuit Judge:*

These cases are alike in respect to the main question involved, which is said to be of great importance to the business of stock brokers in New York City and may be disposed of together as to it. Certain features in which they differ will be considered separately.

January 19, 1910, between twelve and one o'clock, the stock broking firms of J. M. Fiske & Company and Lathrop, Haskins & Company failed, as the result of the collapse of a pool or pools in the stock of the Columbus & Hocking Valley Coal & Iron Company.

At the beginning of banking hours on that day Fiske & Company had arranged for a day or clearance loan of $400,000 from the Mechanics, now the Mechanics & Metals National Bank, and Lathrop, Haskins & Company had arranged for one of $500,000 from the National City Bank. The banks becoming uneasy about the financial condition of the brokers as the day progressed, demanded security for their accounts and obtained from each a large quantity of collaterals. Between twelve and one o'clock the firms notified the Stock Exchange that they were unable to meet their engagements and subsequently each was adjudicated a bankrupt. The trustee of each estate brought a plenary action in equity for recovery of the securities or their value as a preference voidable by him under Sec. 60 of the Bankruptcy Act and also in the case of Fiske & Company for some $54,000 in cash deposited by them on the morning of the 19th in their account with the bank. The proceedings were referred to a Special Master, who took testimony and reported tha

each transaction was a voidable preference and directed the banks to account for the securities and cash to the trustees in bankruptcy of the failed firms. This report was confirmed by the District Court and the banks have taken the appeals which are now to be disposed of.

Fiske & Company had been dealing with the Mechanics National Bank since November 8, 1901, under the following written contract:

"Know all men by these presents, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee, or in any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which said indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:

1. All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or hereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such

application. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said Bank."

On January 19th they applied for a day loan (which was granted), as follows:

"NEW YORK, *January* 19, 1910.

Mechanics National Bank, New York City:

Please loan us today $400,000. Crediting this amount to our account, and oblige.

J. M. FISKE & COMPANY."

On the same day Lathrop, Haskins & Company applied to the National City Bank for a day loan of $500,000 and signed two notes differing only in amount, in the following form:

"$300,000. NEW YORK CITY, *January* 19, 1910.

On demand for value received we promise to pay to The National City Bank of New York, or order, Three hundred thousand ($300,000) Dollars, hereby agreeing that said Bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to demand additional security, and with the right, upon default in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public expense or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said Bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

LATHROP, HASKINS & CO."

The proofs show that in New York City contracts of brokers to deliver stock sold and to pay for stocks purchased must be carried out the next day and that credit from banks is absolutely necessary to enable them to release the securities they have sold, which are generally pledged in banks or trust companies, and with their proceeds to pay for the securities they have bought. To enable them to clear these transactions the banks at 10 A. M. of each business day extend a credit which must be repaid by 3 P. M. of the same day. These loans are made from day to day and are called day or clearance loans, no interest being charged upon them.

We have no doubt that both the firms in question were insolvent when they delivered the securities and deposited the cash and that the banks had reasonable cause to believe so. But it is not every

transfer by an insolvent within the four months period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference. Authorities upon this subject may be found in Collier on Bankruptcy, 8th Edition, page 664, and Loveland on Bankruptcy, 4th Edition, Sec. 512.

No doubt a contract might be made between a bank and a broker stipulating that the day loan should be used specifically for the release of the broker's pledged securities and that their proceeds or the proceeds of substituted securities should be immediately deposited in the bank in repayment of the loan. As it would not be possible for the bank itself to send around checks to the various trust companies and actually take up the pledged securities belonging to its stock broking depositors and deliver them to purchasers against payment of the price, the agreement of the broker to do this would make him agent or trustee of the bank and would seem to be quite sufficient to bring the transaction within the cases held not to constitute preferences. The loan and repayment the same day should be regarded as one transaction, the fact that they were not literally contemporaneous being a necessary result of the nature of the business. It would not be possible to act like a farmer, who holds the cow's tail in one hand until he gets payment for her in the other. We think it would make no difference under such a contract, that the bank did not know what specific securities were to be released or that it permitted the broker to deliver the same to purchasers. See on the subject generally, Sexton vs. Kessler, 172 F. R., 535; 225 U. S., 90; Mills vs. Virginia-Carolina Lumber Co., 164 F. R., 168. A particularly apposite case is Dessel vs. North State Lumber Co., 119 F. R., 531.

In these cases the banks seek to escape by claiming that they had an equitable lien upon the securities subsequently delivered and cash deposited by the brokers and that they were receiving only their own property. Each of them, however, admits that it made the day loan under the written agreements above mentioned. Each contained provisions as to securities in the possession, but none as to securities not in the possession of the bank. Those in question here were not in the possession of the banks. Moreover, neither the banks nor the brokers when the transfers were made spoke of securities specifically covered by their loans. The banks simply demanded security generally and took whatever they could get. The conduct of the parties at the time is inconsistent with any claims to specific securities or their proceeds. We see no ground for claiming an equitable lien under these contracts alone.

The banks, however, also allege a usage of the business which requires the clearance loan to be so applied which they seek to annex to the written contracts. It is objected that such a usage cannot be proved, because it contradicts or adds to the written contract. We do not think the usage contradicts the contracts because they contemplated collateral delivered against loans, whereas these day or clearance loans are never made against collateral. Proof of such a usage would only be as to the way in which the day loans were to be applied

and would be entirely consistent with the written contracts. It may very well be that if the broker failed to carry out the contract, equity would not aid the bank to the prejudice of creditors generally, but this is no ground for saying that if the contract had been carried out, equity would intervene to disturb it.

The following extract from a stipulation made in the case is the best statement made in support of the banks' claim:

"It is further stipulated that if members of the stock exchange houses to which the said banks made the said so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account there was also credited the balance he had on deposit with the bank at the opening of the day.

That all of the moneys received by him in the course of his business throughout the day, from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid.

That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities, but it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof.

That the securities he received as aforesaid were not kept separate but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans.

That he kept no separate account of the moneys received on the deliveries of stock acquired by him as before mentioned, but that all the moneys received by him, in the course of the day, from whatever source, were deposited by him to the credit of his said account with the bank making the said loan.

That the said day or clearance loans were paid off by his check or checks drawn to the order of the bank, at the close of the day. That during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after the same were received; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for

him to obtain a demand or time loan at the Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid. The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and however those securities were acquired by him; or he, the broker, might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan would be credited to his general account with the bank and the so-called day or clearance loan would be paid at the close of the day by check drawn against this account."

We do not think that the usage alleged was proved. It was abundantly established that the brokers do repay banks for the clearance loan on the same day and generally with the proceeds of the released securities or of substantial securities and that it is understood or expected that this shall be done. This, however, only shows the way in which the business is done. It could hardly be done and certainly could not be continued in any other way. Such a course of business does not establish that the brokers have agreed to do these things or are bound by usage to do them or that the banks are entitled to the proceeds of the released securities. Indeed, we understand that the question as to the rights and obligations of the parties if the broker fails to repay or secure the clearance loan on the day it was made is raised for the first time in the cases now under consideration. Therefore, we agree with the conclusion of the Special Master and the court below on the main question involved in both cases.

There are two particulars in which the cases differ from each other, now to be considered separately.

In the case of the National City Bank, the Trustee claims that he is entitled to the value of the securities at the time they were transferred, they having in the meantime depreciated considerably. The Bankruptcy Act, Sec. 60 (*b*) does provide that in the case of a voidable preference the trustee "may recover the property or its value." The Special Master and the court below, however, held and we think rightly, that the Trustee had left the disposition of the securities to the absolute discretion of the bank, their proceeds, if sold, to stand in their place. Under such circumstances, it would be inequitable to hold the bank liable for the depreciation. All the Trustee is entitled to is a return of the securities and an accounting as to any dividends or interest collected in the meantime.

In the case of the Mechanics National Bank, a deposit was made by Fiske & Company on the morning of January 19, which the Trustee claims should be returned with interest as a voidable preference. This for the reason that the bank had ordered no more certifications to be made before the deposit was received, which it is contended was a closing of the account, so that the relation of debtor and creditor between the firm and the bank did not exist as to this fund. The Special Master and the court below held that the deposit was made after the bank had knowledge of the broker's insolvency, or at least

was put on inquiry, so that the deposit was a voidable preference, just as much as the delivery of the securities. In this view we concur. The decrees are affirmed.

L. H. Freedman for the Appellant.
D. P. Hays for the Appellees.
John A. Garver for the Defendant.
A. I. Elkus for the Complainant.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 19th Day of December, One Thousand Nine Hundred and Twelve.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Henry G. Ward,
Circuit Judges.

Irving L. Ernst et al., as Trustees, etc., Complainants-Appellees,
vs.
Mechanics' and Metals National Bank of the City of New York, Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
A. C. C.

Endorsed: United States Circuit Court of Appeals, Second Circuit. I. L. Ernst vs. Mechanics & Metals Bank. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 23, 1912. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske, and Arthur C. Sherwood, Individually and as Copartners Composing the Firm of J. M. Fiske & Company, and of the Firm of J. M. Fiske & Company, Bankrupts, Complainants-Appellees,

against

THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant-Appellant.

Petition for Appeal.

The above named defendant-appellant, The Mechanics' and Metals National Bank of the City of New York, respectfully shows that a final decree has been rendered in the above entitled cause on the 23rd day of December, 1912, affirming the final decree herein of the District Court of the United States for the Southern District of New York made and entered on or about the 9th day of January, 1912, upon the merits, with costs, and the defendant-appellant conceiving itself aggrieved thereby, and the cause being one in which the United States Circuit Courtof Appeals for the Second Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on Appeal, the matter in controversy exceeding $100,000 besides costs.

Wherefore the said defendant-appellant appeals from the said decree of the 23rd day of December, 1912, to the Supreme Court of the United States, and prays that this appeal may be allowed and a citation granted and directed to the above named complainants-appellees, Irving L. Ernst, Lindsay Russell and Harford T. Marshall as Trustees in Bankruptcy of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as copartners composing the firm of J. M. Fiske & Company, and of the firm of J. M. Fiske & Company, Bankrupts, commanding them, and each of them, to appear before the Supreme Court of the United States, and to do and receive justice in the premises, and that a transcript of the record, proceedings and papers upon which such judgment was entered may be duly authenticated and sent to the Supreme Court of the United States.

Dated, New York, January 24th 1913.

ADRIAN H. LARKIN,
Solicitor for The Mechanics' and Metals National Bank of the City of New York, Defendant-Appellant.

Office & Post Office Address, No. 54 Wall Street, Manhattan, New York City.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be, and it hereby is allowed as prayed this 24th day of January, 1913.

H. G. WARD, *U. S. C. J.*

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Irving L. Ernst et al., Complainants-Appellees, vs. The Mechanics' and Metals National Bank of the City of New York, Defendant-Appellant. Petition for Appeal. Adrian H. Larkin, Solicitor for The Mechanics' and Metals National Bank of the City of New York, 54 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. Fiske et al., and J. M. Fiske & Company, Bankrupts, Complainants-Appellees,

against

THE MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant-Appellant.

Assignment of Errors.

The Mechanics' and Metals National Bank of the City of New York as aforesaid, having appealed to the Supreme Court of the United States from the final decree of the United States Circuit Court of Appeals, Second Judicial Circuit, dated the 19th day of December, 1912, and entered in the office of the Clerk of the United States Circuit Court of Appeals, Second Judicial Circuit, on the 23rd day of December, 1912, affirming the decree of the District Court of the United States for the Southern District of New York dated the 8th day of January, 1912, and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 9th day of January, 1912, granting the prayer of the complainants' bill upon the merits and costs, now makes and files the following assignment of errors herein:

1. The said Court erred in affirming said decree of the District Court of the United States.

2. The said Court erred in awarding costs against the defendant-appellant upon affirming said decree.

3. The said Court erred in remanding the case to the District Court of the United States directing that the decree of said District Court be affirmed with costs.

4. The said Court erred in not dismissing the bill of complaint.

5. The said Court erred in adjudging and decreeing that the transfers and deliveries of the stocks, bonds, securities and moneys referred to in the complaint herein by the bankrupts J. M. Fiske & Company, to the defendant-appellant, The Mechanics' and Metals National Bank of the City of New York, on January 19th, 1910, were and are unlawful performances within the meaning of the Bankruptcy Act of 1898 and the amendments thereto, and are void, and setting aside the said transfers and deliveries.

6. The said Court erred in not holding and deciding that there was no competent proof as to the financial status of the said firm of

J. M. Fiske & Company, nor of the individual members thereof, at the time of the delivery of said securities to Mr. Roe, the representative of the defendant-appellant, by Mr. Sherwood, a member of the said firm of J. M. Fiske & Company, and the deposit of certain items of cash by said firm of J. M. Fiske & Company with said defendant-appellant, and that the aggregate amount of the property of said firm, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay creditors was of a fair valuation sufficient in amount to pay its debts.

7. The said Court erred in holding and deciding that the books of J. M. Fiske & Company were admissible as competent material and relevant evidence of proof of insolvency of the said firm.

8. The said Court erred in holding and deciding that said books had been properly proved.

9. The said Court erred in holding and deciding that when the defendant-appellant, received the cash and securities on the 19th day of January, 1910 it had reasonable cause to believe that the said firm of J. M. Fiske & Company and the individual members thereof were insolvent.

10. The said Court erred in not holding and deciding that at the time of the receipt of said securities and cash the defendant-appellant had not reasonable cause to believe that the said firm of J. M. Fiske & Company and the individual members thereof were insolvent.

11. The said Court erred in holding and deciding that the information received by the defendant-appellant through Mr. Roe on the 19th day of January, 1910, was sufficient in law to have led an ordinary, prudent business man to an inquiry of the firm of J. M. Fiske & Company's financial condition, and that said inquiry would have revealed the insolvent condition of said firm.

12. The said Court erred in holding and deciding that the information which Mr. Roe received was not sufficient in law to lead an ordinary prudent business man to an inquiry of the firm of J. M. Fiske & Company's financial condition.

13. The said Court erred in holding and deciding that under the circumstances revealed by the record Mr. Roe, as agent of the defendant-appellant, was bound to make inquiries of Mr. Sherwood or Mr. Humphreys when he was at the office of J. M. Fiske & Company as to the financial condition of said firm, and that had he made such inquiries he would undoubtedly have been informed as to its financial condition.

14. That said Court erred in not holding and deciding that there was no duty upon Mr. Roe under the circumstances to make inquiries of Messrs. Sherwood or Humphreys as to the financial condition of the firm of J. M. Fiske & Company.

15. The said Court erred in holding and deciding that the defendant-appellant must be deemed to have such knowledge as Mr. Roe would have obtained had he made inquiry as to the financial condition of J. M. Fiske & Company.

16. The said Court erred in not holding and deciding that the de-

fendant-appellant must not be deemed to have such knowledge sufficient to fasten upon it a reasonable cause to believe that said firm of J. M. Fiske & Company was in fact bankrupt at the time of the delivery by it of said property on the 19th day of January, 1910, and in not finding that the record did not reveal that had such inquiry been made Mr. Roe would have, as a matter of fact, obtained information as to the true financial status of said firm of J. M. Fiske & Company.

17. The said Court erred in holding and deciding that the defendant-appellant must have had knowledge that the firm of J. M. Fiske & Company was insolvent, and having such knowledge, to have had reasonable cause to believe that the fact of the transfer would have been to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

18. The said Court erred in holding and deciding that the cancelling of the day loan and Mr. Roe's instructions to the clerks of the defendant-appellant not to pay or certify any more checks for the account of J. M. Fiske & Company, and the closing and balancing of said account of said firm with said bank, was sufficient to cause Mr. Roe to believe that the firm was unable to pay its debts.

19. The said Court erred in not finding and deciding that said steps and each of them were merely precautionary and pursuant to the terms of an agreement existing between the parties, and that there was no ground to cause Mr. Roe to believe that said firm of J. M. Fiske & Company and the individual members thereof were, as a matter of fact, unable to pay their debts.

20. The said Court erred in holding that the effect of the said transfer and securities to the defendant-appellant enabled it to maintain a greater percentage of its debt than other creditors of the same class.

21. The said Court erred in failing to hold that said defendant-appellant had not reasonable cause to believe that it was intended by said firm in the delivery of said securities and cash and the payment of said cash to give to said defendant-appellant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

22. The said Court erred in not holding and deciding that the delivery of the physical possession of the property and securities received by the defendant-appellant on the 19th day of January, 1910 from the bankrupts J. M. Fiske & Company was in accordance with a valid contract made at a time prior to four months before the filing of the petition in bankruptcy against the bankrupts, and in not finding that said contract was valid and effective against the complainants-appellees.

23. The said Court erred in not holding and deciding that the defendant-appellant had an equitable lien or claim or right on or in the property, cash and securities mentioned in the bill of complaint and received by it on the 19th day of January, 1910 which was valid against the complainants-appellees, as Trustees in bankruptcy.

24. The said Court erred in holding and deciding that the bankrupts did not make any particular property or fund security for the

debt or obligation by virtue of which the defendant-appellant seeks to hold the property and securities received by it on the 19th day of January, 1910, and in holding and decreeing that the bankrupts did not agree to keep on hand particular specified property or the proceeds thereof as security for the debt due from them to the defendant-appellant.

25. The said Court erred in holding and deciding that the agreement and contract between the bankrupts and the defendant-appellant and the course of conduct of the parties thereunder and the custom of the financial district where said contract was made and performed, as appears in the record, did not create an equitable claim or lien or right in favor of the defendant-appellant on the property and securities received by it on the 19th day of January, 1910, valid and effective against the complainants-appellees as Trustees in bankruptcy as aforesaid.

26. The said Court erred in not holding and deciding that there was prior to the four months next preceding the filing of the petition in bankruptcy against said firm of J. M. Fiske & Company and the members thereof, a certain bona fide agreement by and between the said bankrupts and the defendant-appellant whereby the said bankrupts agreed to hold specific property or the proceeds thereof for the benefit of the said defendant-appellant, which said agreement amounted to an equitable lien, claim or right valid against the complainants-appellees, as Trustees in bankruptcy.

27. The said Court erred in not holding and deciding that there was an express agreement between J. M. Fiske & Company, the bankrupts, and the defendant-appellant made prior to four months next preceding the filing of the petition in bankruptcy against the said bankrupts, pursuant to which J. M. Fiske & Company agreed to make the particular property received by said firm on the 19th day of January, 1910 a security for the debt or other obligation of said firm to the defendant-appellant enforceable against the complainants-appellees as Trustees in bankruptcy of said bankrupts.

28. The said Court erred in not holding and deciding that the defendant-appellant had a right, title and interest in and to the property and securities received by it from J. M. Fiske & Company on the 19th day of January, 1910, and existing before the receipt of said property on said day not in contravention of the bankruptcy act nor destroyed by the adjudication in bankruptcy of said bankrupts and valid as against the complainants-appellees, as Trustees in bankruptcy.

29. The said Court erred in holding and deciding that the agreement between the said bankrupts and the defendant-appellant as shown in the record in relation to the property and securities received by the defendant-appellant on the 19th day of January, 1910, did not confer upon said defendant-appellant the right to reduce the said property and securities to possession.

30. The said Court erred in holding and deciding that equity will not enforce as against the complainants-appellees, as Trustees in bankruptcy, the agreement disclosed by the record between the bankrupts aforesaid and the defendant-appellant.

31. The said Court erred in not holding and deciding that the legal or equitable title in the securities or property received by the defendant-appellant on the 19th day of January, 1910 passed to the said defendant-appellant prior to the filing of the petition in bankruptcy against the said bankrupts, and that there is no express law invalidating the transfer on the facts disclosed in the record.

32. The said Court erred in holding and deciding that the common stock of the Columbus & Hocking Coal & Iron Company on the 19th day of January, 1910 did not have any substantial value, and that its price on the New York Stock Exchange was maintained by a pool organized to invalidate it.

33. The said Court erred in not holding and deciding that the defendant-appellant had no knowledge through which it would have had reasonable cause to believe that said firm was insolvent and that by receiving such property it would have reasonable cause to believe that the effect of the transfer would have been to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

34. That said Court erred in holding and deciding that the defendant-appellant is among the general class of creditors of the bankrupts whose claims aggregate upwards of a million dollars.

35. The said Court erred in holding and deciding that the defendant-appellant is not a general creditor and that there is no other creditor of the said firm of J. M. Fiske & Company, or of the partners thereof, of the same class as the defendant-appellant.

36. The said Court erred in holding and deciding that a condition did not exist out of which any custom or usage could arise.

37. The said Court erred in not holding and deciding that the record revealed the existence of condition out of which a custom or usage could arise, and that the facts were that the custom or usage as set forth in the record did in fact exist.

38. The said Court erred in holding and deciding that considering the purposes for which "day loans" are made by banks in the financial district of the City of New York to Stock Exchange Brokers in the City of New York no such custom could exist.

39. The said Court erred in not holding and deciding that the facts as shown reveal that said "day loans" made by and between banks and stock exchange brokers in the City of New York, N. Y. were governed by said custom as shown by *by* the record and that the same as a matter of fact did exist.

40. The said Court erred in holding and deciding that the result of the day's transactions leads to the payment of the day loans and not to their security, and such is the understanding and intent of both borrower and lender.

41. The said Court erred in not holding and deciding that the intent of both borrower and lender is to secure said day loans at the time that they are made, and that the same shall remain secured at all times until paid, and that the lender shall from the time that the loan is made have a lien or claim upon or interest in said funds and the avails thereof, no matter what form they shall take, until the payment and discharge of said "day loans."

42. The said Court ered in holding and deciding that no custom or usage was shown to exist between banks in the City of New York and Stock Exchange brokers in reference to the method of paying the unpaid balance of said "day loans."

43. The said Court erred in holding and deciding that a custom or usage does exist between banks in the City of New York, N. Y. and Stock Exchange brokers in reference to the method of paying the unpaid balance of said "day loans."

44. The said Court erred in holding and deciding that the defendant-appellant had no lien or right upon or claim in or to the property and securities in question, and that at the time of the delivery thereof to its agents it had no pre-existing right to or lien or right thereon or claim therein or thereto.

45. The said Court erred in holding and deciding that the defendant-appellant is not entitled to retain the sum of $54,048.08, constituting the deposit made by the said firm of J. M. Fiske & Company with the defendant-appellant on the 19th day of January, 1910.

46. The said Court erred in not holding and deciding that the defendant-appellant was entitled to retain the sum of $54,048.08, constituting the deposit made with it by the said firm of J. M. Fiske & Company, in the course of business on the 19th day of January, 1910.

47. The said Court erred in holding and deciding that the defendant-appellant never received or held the said sum of $54,048.08 as a deposit or received or held the same as a bank or banker, and that said firm of J. M. Fiske & Company never had a right to draw against the said sum.

48. The said Court erred in not holding and deciding that the said defendant-appellant did not receive the said sum of $54,048.08 as a bank deposit, and that the right of said firm of J. M. Fiske & Company to draw against the same was absolute until the time of the failure of said firm subsequent to the making of said deposit and the application of the same to the indebtedness of J. M. Fiske & Company pursuant to its agreement with the defendant-appellant.

49. The said Court erred in holding and deciding that the deposit of $54,048.08 was made when the said firm of J. M. Fiske & Company and the individual members thereof were insolvent, and was applied by the defendant-appellant to the payment of the indebtedness to it by the said firm of J. M. Fiske & Company when said defendant-appellant had reasonable cause to believe that it was intended by said firm in making said deposit to give to said defendant-appellant a preference whereby it would be enabled to obtain a greater percentage of its debt than any other creditor of the same class.

50. The said Court erred in not holding and deciding that said firm of J. M. Fiske & Company was solvent and that said sum of $54,048.08 was received by said defendant-appellant as a deposit and was not applied by said defendant-appellant to the payment of said indebtedness of said firm of J. M. Fiske & Company to it until subsequent to the time of the making of said deposit, when the same was, pursuant to the terms of the agreement existing between the

parties, set off against the indebtedness of the said firm of J. M. Fiske & Company to the defendant-appellant, and that said set off was legal and in accordance with the rights of the defendant-appellant pursuant to the terms of the Bankruptcy Act of 1898 and amendments thereto.

51. The said Court erred in holding and deciding that said defendant-appellant treated the said deposit of $54,058.08 as a partial payment of the indebtedness of J. M. Fiske & Company to it.

52. The said Court erred in not holding and deciding that said sum of $54,048.08 was received as a deposit on account of said firm's banking account with the defendant-appellant and was set off against said indebtedness subsequent to the deposit thereof.

53. The said Court erred in holding and deciding that the deposit of said sum of $54,048.08 constituted a preference as defined by Section 60 of the Bankruptcy Act of 1898 as amended, and that the transfer thereof is void by the complainants-appellees and that they are entitled to set the receipt by the defendant-appellant of said sum aside in accordance with the prayer of the bill of complaint.

Wherefore the defendant-appellant, The Mechanics' and Metals National Bank of the City of New York, prays that a decree of the United States Circuit Court of Appeals for the Second Circuit, dated the 19th day of December, 1912, affirming a decree of the United States District Court for the Southern District of New York dated the 8th day of January, 1912 may be reversed, and that said United States District Court may be directed to dismiss the bill of complaint herein together with costs.

Dated, New York, January 24th, 1913.

ADRIAN H. LARKIN,
Solicitor for Defendant-Appellant.

Office & Post Office Address, 54 Wall Street, Borough of Manhattan, City of New York.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Irving L. Ernst and others, as Trustees, &c. vs. The Mechanics & Metals National Bank of the City of New York. Assignment of Errors. Adrian H. Larkin, Solicitor for defendant, No. 54 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. Fiske et al., and J. M. Fiske & Company, Bankrupts, Plaintiffs,

against

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

Order Allowing Supersedeas.

The appellant, The Mechanics & Metals National Bank of the City of New York as aforesaid, having heretofore filed its petition for an

appeal from a final decree rendered herein on the 19th day of December, 1912, and entered in the office of the clerk of the United States Circuit Court of Appeals, Second Judicial Circuit, on the 23rd day of December, 1912, affirming the judgment of the District Court of the United States for the Southern District of New York herein dated the 8th day of January, 1912, and filed in the office of the Clerk of the United States District Court on the 9th day of January, 1912, and granting the prayer of the plaintiffs-appellees' bill of complaint upon the merits, with costs, and having filed an assignment of errors, and said appeal having been heretofore allowed to the petitioner The Mechanics & Metals National Bank of the City of New York, aforesaid, it is

Ordered that said appeal shall operate as a supersedeas of the decree herein of the 19th day of December, 1912, and shall stay the execution of said bill pending such appeal upon the execution of a bond in the penalty of the sum of two hundred and fifty-six thousand one hundred and fifty-three and 29/100 dollars ($256,153.29). On the consent of the attorneys for the plaintiffs-appellees the undertaking of the defendant-appellant without surety is accepted.

Dated New York, January 24, 1913.

H. G. WARD, *U. S. C. J.*

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Irving L. Ernst and others, as Trustees, &c. vs. The Mechanics & Metals National Bank of the City of N. Y. Order Allowing Supersedeas. Adrian H. Larkin, Solicitor for defendant, No. 54 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

IRVING L. ERNST, LINDSAY RUSSELL, and HARFORD T. MARSHALL, as Trustees in Bankruptcy of J. M. Fiske et al., and J. M. Fiske & Company, Bankrupts, Plaintiff,

against

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

Know all men by these presents that The Mechanics & Metals National Bank of the City of New York is held and firmly bound unto the above-named plaintiffs, Irving L. Ernst, Lindsay Russell and Harford T. Marshall as Trustees in Bankruptcy of Arthur C. Sherwood, Dudley T. Humphrey, Clifford M. Washburn and Josiah M. Fiske individually and as copartners composing the firm of J. M. Fiske & Company and the firm of J. M. Fiske & Company, in the sum of two hundred and fifty-six thousand one hundred and fifty-three and 29/100 dollars ($256,153.29) to be paid to the plaintiffs, for the payment of which well and truly to be made said The Mechanics & Metals National Bank of the City of New York binds itself, its successors and assigns firmly by these presents.

Sealed with its seal and dated the 24th day of January, in the year of our Lord one thousand nine hundred and thirteen.

Whereas the above-named The Mechanics & Metals National Bank of the City of New York has heretofore prosecuted an appeal to the United States Circuit Court of Appeals for the Second Judicial Circuit to reverse the decree rendered in the above-entitled suit by the Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York on January 9th, 1912; and

Whereas said United States Circuit Court of Appeals for the Second Judicial Circuit has heretofore and on or about the 19th day of December, 1912, by its order duly entered affirmed said decree of the District Court of the United States rendered as aforesaid; and

Whereas the said The Mechanics & Metals National Bank of the City of New York has prosecuted an appeal to the United States Supreme Court from the said order of the United States Circuit Court of Appeals for the Second Judicial Circuit dated the 19th day of December, 1912;

Now, therefore the condition of this obligation is such, that if the above-named The Mechanics & Metals National Bank of the City of New York shall prosecute the said appeal to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed and delivered, Taken and acknowledged, this 24th day of January, 1913.

THE MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK.

[SEAL.] By G. W. McGARRAH, *President.*

Attest:

[L. S.] J. S. HOUSE, *Cashier.*

STATE OF NEW YORK,
County of New York, ss:

On this 24th day of January, 1913, before me personally appeared Gates W. McGarrah, President of The Mechanics & Metals National Bank of the City of New York, to me known, who, being by me duly sworn did depose and say that he resides in the Borough of Manhattan, City, County, and State of New York; that he is the President of The Mechanics & Metals National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law.

And the said Gates W. McGarrah further says that he is acquainted with Joseph S. House, and knows him to be the Cashier of said corporation; that the signature of said Joseph S. House sub-

scribed to the said instrument is the genuine handwriting of the said Joseph S. House and was thereto subscribed by the like order of the said Board of Directors and in the presence of him the said Gates W. McGarrah, President.

[SEAL.]

ARTHUR W. McKAY,
Notary Public, Kings Co.

Ctf. filed in N. Y. County, #20.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Irving L. Ernst, Lindsay Russell, &c. vs. The Mechanics & Metals National Bank of the City of New York. Bond. Adrian H. Larkin, Solicitor for defendant, No. 54 Wall Street, N. Y. City. The within undertaking is approved and surety thereon waived January 24th, 1913. Hays, Hershfield & Wolf, Solicitors for pl'ffs-resp'd't. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk. Approved. H. G. Ward, U. S. J. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 550 inclusive, (in 2 volumes) contain a true and complete transcript of the record and proceedings had in said Court, in the case of Irving L. Ernst, et al., as Trustees, etc., Complainants-Appellees, against Mechanics' & Metals National Bank of the City of New York, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of January in the year of our Lord One Thousand Nine Hundred and thirteen and of the Independence of the said United States the One Hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

By the Honorable Henry G. Ward, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Irving L. Ernst, Lindsay Russell, and Harford T. Marshall, as Trustees in Bankruptcy of Dudley P. Humphrey, Clifford M. Washburn, Josiah M. Fiske, and Arthur C. Sherwood, individually and as co-partners composing the firm of J. M. Fiske and Company, and the firm of J. M. Fiske and Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden in the City of Washington District of Columbia, on the 22nd day of February, 1913, pursuant to an appeal filed in the Clerk's Office of the United States Cir-

cuit Court of Appeals for the Second Circuit, wherein The Mechanics and Metals National Bank of the City of New York is appellant and you are appellees to show cause, if any there be, why the decree in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named, this 24th day of January, in the year of our Lord One Thousand Nine Hundred and thirteen, and of the Independence of the United States the One Hundred and Thirty-seventh.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Citation. Service of a copy of the within citation is hereby admitted. New York Jan. 24, 1913. Hays, Hershfield & Wolf, Att'y- for Compl'ts. United States Circuit Court of Appeals. Second Circuit. Filed Jan. 24, 1913. William Parkin, Clerk.

Endorsed on cover: File No. 23,530. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 955. The Mechanics' and Metals National Bank of the City of New York, appellant, vs. Irving L. Ernst, Lindsay Russell, and Harford T. Marshall, as trustees in bankruptcy of Dudley P. Humphrey et al. Filed February 1st, 1913. File No. 23,530.

Office Supreme Court, U. S.
FILED.
APR 30 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 446

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as co-partners, composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,
Complainants-Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant-Appellant.

Sirs.—Please take notice that a motion will be made, for the reasons hereto annexed, before the United States Supreme Court, at a session thereof, to be held at the Capitol, in the State of Washing-

ton, D. C., on Monday, the 5th day of May, 1913, at 12 o'clock noon, or as soon thereafter as counsel can be heard, for a rule or order advancing this cause and setting it down for hearing and argument on a day to be fixed by the Court.

Dated, New York, April 25, 1913.

Yours, &c.,

DANIEL P. HAYS,
Attorney for Complainant-Appellees,
Office & Post Office Address,
115 Broadway,
Borough of Manhattan,
New York City.

To JOLINE, LARKIN & RATHBONE, ESQS.,
Attorneys for Defendant-Appellant,
#54 Wall Street, New York City.

SUPREME COURT OF THE UNITED STATES.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of Dudley T. Humphrey, Clifford M. Washburn, Josiah M. Fiske and Arthur C. Sherwood, individually and as co-partners, composing the firm of J. M. Fiske & Company, and the firm of J. M. FISKE & COMPANY,
Complainants-Appellees,

AGAINST

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant-Appellant.

} Petition.

Now come IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, Trustees in Bankruptcy of the above named bankrupts, the complainants-appellees of record herein, by Daniel P. Hays, their counsel, and move this Honorable Court to advance the above entitled cause upon the calendar and set the same down for argument for a day certain because of the existence of certain special and peculiar circumstances, as follows:—

First.—This cause is similar to the cause of Hotchkiss *vs.* National City Bank, in which appeals are now pending before this Court, being Nos. 974 and 975 upon the October, 1912, Calendar of

this Court, which said appeals have been advanced upon motion of complainant therein and have been set for argument for October 14th, 1913.

Second.—The appeals in both this cause and the cause of Hotchkiss *vs.* National City Bank involve the question of the legality of certain transfers made under substantially the same circumstances. Both causes were tried at the same time before the same Special Master. Thereafter they were argued at the same time in the District Court. The appeals in both causes from the judgments of the District Court were placed together upon the Calendar of the Circuit Court of Appeals for the Second Circuit and the argument in the case of Hotchkiss *vs.* National City Bank followed immediately after the argument in this cause. The Circuit Court of Appeals in deciding said causes wrote one opinion covering both causes, stating, at the beginning of said opinion:

> "These cases are alike in respect to the main question involved, which is said to be of great importance to the business of stock brokers in the City of New York, and may be disposed of together as to it."

Third.—Complainants herein are the Trustees in Bankruptcy of the above named bankrupts, against whom a petition in involuntary bankruptcy was filed on January 19th, 1910. Complainants were thereupon appointed receivers in bankruptcy of said bankrupts and continued to act as such until May 5th, 1910, when they were duly elected trustees in bankruptcy of said bankrupts, in which capacity they have ever since continued to act.

Fourth.—The above entitled cause was brought to set aside the transfer of certain securities and money by the said bankrupts to the defendant, on the ground that such act was a preferential transfer. Decision was rendered in favor of the complainants in the United States District Court for

the Southern District of New York, which decision was thereafter affirmed by the United States Circuit Court of Appeals for the Second Circuit on or about the 11th day of April, 1912. Appeal has been taken by the defendant to this Court from the decision and this appeal is now pending and is numbered 955 upon the October, 1912, Calendar of this Court. This appeal will not be reached for argument in the regular course for at least two years and possibly not for a longer time.

Fifth.—The above entitled cause involves about $250,000, which, by the terms of the decision of the District Court and the Circuit Court of Appeals in complainants' favor, would be available for distribution to the creditors of the above named bankrupts. By reason of the appeal taken by the defendant to this Court, distribution of this amount will necessarily be delayed for probably two years or more. The pendency of this appeal is the principal obstacle in the way of closing up said bankrupts' estate, and a long delay in deciding the appeal will inevitably work a great hardship upon the creditors of said bankrupts.

Because of the foregoing facts, the undersigned prays this Court for a rule or order advancing said cause pursuant to sub-division 7 of Rule 26 of this Court and setting the argument of the appeal herein for the same day as that fixed for the argument of the cause of Hotchkiss *vs.* National City Bank, to wit: October 14th, 1913.

Respectfully Submitted.

DANIEL P. HAYS,
Attorney for Complainants-Appellees,
Office & Post Office Address #115 Broadway,
Borough of Manhattan, New York City.

No. 446

SEP 24 1918

JAMES D. MAHONEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1918. No. [redacted]

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Appellant,

vs.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HAMMERSLEY, et al.,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF APPELLANT, THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK.

ADRIAN H. LARKIN,

Solicitor for Appellant.

ADRIAN H. LARKIN,
LEWIS H. FREEDMAN,
LELAND B. GARRETSON,
Of Counsel.

(20,000 words.)

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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 995.

THE MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant,

AGAINST

IRVING L. ERNST, LINDSAY RUSSELL and HARFIELD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY *et al.*,
Appellees.

No. 995.

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from a final decree rendered in the United States Circuit Court of Appeals for the Second Circuit on the 23d day of December, 1912, affirming a decree of the United States District Court for the Southern District of New York, entered January 9, 1912 (p. 520) (201 Fed., 664).

The decree of the District Court confirmed the report of a Special Master before whom the case was tried on consent of both

parties, after hearing upon exceptions, and decreed that certain transfers and deliveries of stocks, bonds, securities and moneys, made by the bankrupt firm of J. M. Fiske & Co. to the appellant on the 19th day of January, 1910, were unlawful preferences within the meaning of the Bankruptcy Act of 1898, as amended, and were void and should be set aside, and that the appellees, the Trustees in Bankruptcy of said firm of J. M. Fiske & Co., should recover from the appellant, the sum of $255,312.21, being the amount realized by the appellant from the securities, property and cash received by it, together with costs (pp. 351-353).

The questions involved in this appeal are as follows:

1. Whether the transactions between appellant and the firm of J. M. Fiske & Company on the 9th day of January, 1910, in view of the contract relations existing between them and in view also of the custom of the financial district in the City of New York, which the appellant claims governed said transactions, were such that the receipt by the appellant of the securities, property and cash so received by it on that day constituted such a payment as can be avoided and set aside on the suit of the Trustees in Bankruptcy, on the ground that an unlawful preference under the Bankruptcy Act was given and received.

2. Whether at the time the appellant received said securities, property and cash, the elements necessary to satisfy the requirements of Section 60 of the Bankruptcy Act to enable a Trustee in Bankruptcy to successfully maintain such a suit existed.

3. Whether the appellees have properly and by competent evidence established the existence of bankruptcy as a part of their *prima facie* case and as a condition precedent to their right to recover.

Statement of the Case.

On or about November 8th, 1901, the firm of J. M. Fiske & Company, who were stockbrokers in New York City, entered into an agreement in writing with The Mechanics National Bank of the City of New York, the name by which the appellant was known prior to January 29th, 1910, under which agreement the bank, from time to time, loaned the brokers divers sums of money. All loans subsequent to the making of said agreement were made with reference thereto (pp. 15, 111-112). Said agreement is as follows:

> KNOW ALL MEN BY THESE PRESENTS, That the undersigned, in consideration of financial accommodations given or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain, directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or in any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:
>
> 1.—All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time,

and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2.—Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; and upon the failure of the undersigned at all times to keep a margin of securities with said Bank for such liabilities of the undersigned satisfactory to said Bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall at the option of said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

3.—Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said Bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any and all of the liabilities of the undersigned, at private sale or Broker's Board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public auction, said Bank may itself be a purchaser at such sale free from any right

or equity of redemption of the undersigned, such right and equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said Bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future as well as to existing transactions between the undersigned and said Bank.

J. M. FISKE & Co.

Dated, New York, the 8th day of November, 1901.

(Defendant's Exhibit A, pp. 452-454.)

At the opening of business on January 19, 1910, the said firm of J. M. Fiske & Company had on deposit with the appellant the sum of $36,239.47, and appellant also held two promissory notes of said firm aggregating $55,000, the loans on said notes being secured by collateral deposited with and held by appellant (pp. 80, 103 and 104).

No issue has been raised as to the right of the appellant to set off said deposit against existing indebtedness, and no claim is made for proceeds of the sale of the securities constituting the collateral to the loans aggregating $55,000 (p. 103).

Before or about 10 o'clock A. M., on January 19, 1910, J. M. Fiske & Company delivered to the appellant a written request for a "day" loan, as follows:

"NEW YORK, January 19, 1910.

MECHANICS NATIONAL BANK,
New York City.

Please loan us today $400,000. Crediting this amount to our account, and oblige.

J. M. FISKE & COMPANY."

(p. 379.)

Upon receipt of this request, the appellant credited the said firm with said amount upon its deposit account (pp. 80, 280, 281). This credit was given subject to the agreement of November 8, 1901 (pp. 280 and 281), and it is the contention of the appellant that it was also given subject to the custom of the financial district in the City of New York governing "day" or "clearance" loans.

About 12 o'clock, noon, on said day the brokers deposited with the appellant checks amounting to $54,048.08, so that, including the balance of $36,239.47 standing to the credit of the firm at the opening of business, and the "day" loan made to it that morning, its account showed total credits on that day aggregating $490,287.55. During the same period the appellant certified and subsequently paid checks drawn by said brokers against their account amounting to $276,679.67 (pp. 81, 280 and 281).

Between 11 and 12 o'clock on January 19, 1910, Mr. Frank O. Roe, the Cashier of the appellant, was informed by a clerk in the department of the receiving teller that there was a disturbance in the stock market, some trouble on the Stock Exchange, and that it was rumored that J. M. Fiske & Company was in trouble (pp. 85 and 282). Upon hearing this rumor, Mr. Roe at once ascertained how much J. M. Fiske & Company had drawn on that day, and instructed the paying teller and certification clerk not to pay or certify any more checks for their account *until they should hear further from him* (pp. 87, 88 and 282).

He thereupon consulted with Mr. Knowles, one of the vice-presidents of the bank, told him that he heard the firm of J. M. Fiske & Company "was being talked about," and then went to the office of said firm at No. 42 Broadway, New York (pp. 88 to 90 and 282). Upon arriving at the office of the brokers, Mr. Roe asked for and saw

Mr. Sherwood, one of the members of the firm. This was somewhat before 12 o'clock noon (pp. 88 to 91 and 348). He told Mr. Sherwood that he had heard rumors about his firm; that the appellant had certified a considerable sum for their account on that morning, and that they, J. M. Fiske & Company, had not up to that time made a deposit. Mr. Sherwood replied that a deposit was then on its way to the bank. Mr. Roe did not ask, and Mr. Sherwood did not state the amount of this deposit (pp. 95-96). Mr. Roe then told Mr. Sherwood that he thought he had better give him some securities, whereupon Mr. Sherwood consulted Mr. Humphrey, one of his partners, who went into the cage in the office, got the securities set forth in Plaintiff's Exhibit 6 (p. 381), and gave them to Mr. Sherwood, who in turn handed them to Mr. Roe. Mr. Roe took the securities, glanced over them, put them in his pocket and went directly back to the bank. There was very little said between Mr. Roe and Mr. Sherwood. In reply to Mr. Roe's statement that rumors had come to the bank about the firm, Mr. Sherwood made no direct reply. The entire call lasted somewhat less than five minutes (pp. 92 to 97).

The deposit referred to by Mr. Sherwood arrived during the absence of Mr. Roe from the bank and amounted to $54,048.08 (pp. 80, 81, 110 and 348).

Upon returning to the bank Mr. Roe turned the securities over to the assistant cashier in charge of the Loan Department and instructed him to list them up, which was immediately done (p. 99). He also gave final instructions that the account of the brokers be closed and balanced, and it was found that they were indebted to the bank in the sum of $242,201.50, exclusive of the value of the securities received by Mr. Roe, and exclusive of the indebtedness and interest due on the collateral loans aggre-

gating $55,000 of principal (pp. 101, 102, 104 and 283).

The securities thus obtained by Mr. Roe were subsequently sold by the appellant for the account of the loan and realized $175,647.45 (pp. 100, 276-7, 283 and 381).

It is for the recovery of said deposit of $54,048.08 and the proceeds of said securities amounting to $175,647.45, that this suit was brought.

From Appendix A, attached hereto, it appears that all of the securities delivered by Mr. Sherwood to Mr. Roe, with the single exception of 10 shares of Interboro Metropolitan Co. common stock, had come into the possession of the brokers by the direct use of the $400,000. credit given that morning. It further appears that upon the qualification of the Receivers in Bankruptcy certain other securities came into their possession as a part of the bankrupt estate (p. 128; Plaintiff's Exhibit 7, p. 382).

At 12.40 o'clock P. M. on January 19, 1910, J. M. Fiske & Company gave notice to the New York Stock Exchange of their inability to meet their obligations (Plaintiff's Exhibit 3, p. 379).

At 3.25 o'clock P. M. on said day an involuntary petition in bankruptcy was filed against the said firm and the individual members thereof in the District Court of the United States for the Southern District of New York (Plaintiff's Exhibit 10, p. 394). On March 12, 1910, they were adjudicated bankrupts (Plaintiff's Exhibit 1, p. 375). On May 7, 1910, the bond of the appellees as trustees in bankruptcy was duly approved (Plaintiff's Exhibit 2, p. 378).

For some time prior to the date of the filing of this petition, the firm of J. M. Fiske & Company were and had been members of two certain pools organized, as is stated in the pooling agreements, for the purpose of purchasing in all 40,000 shares of

the common stock of the Columbus and Hocking Coal & Iron Company (Defendant's Exhibits C, D, E, F and G; pp. 471 and 474). In the first of these pools the firm had subscribed for 2,000 shares (Defendant's Exhibit D, p. 477), and in the second for 4,000 shares (Defendant's Exhibit F, p. 474). One James R. Keene was manager of both said pools (Defendant's Exhibit C, p. 477).

At the time of their failure, J. M. Fiske & Company were carrying either for their customers or for their own account, either as members of the pool or otherwise, 9,740 shares of Columbus and Hocking Coal & Iron Company common stock (p. 172). Of this amount, the firm's participation at the time as a member of these pools amounted to 3,300 shares, as shown by the "Four-Fourths" account (pp. 50, 173; Plaintiff's Exhibit 19, p. 402), the remaining 6,440 shares being carried for customers. For a week prior to January 19, 1910, this stock was sold on the New York Stock Exchange between 91¾ and 87¼, and opened on that day at 88½. Its fluctuations on that day covered a range of over 60 points, selling as low as 25, and eventually closing at 37 (p. 272). The result of this fluctuation was to cause a panic in this stock (p. 162). For the purposes of this suit, the value of this stock is taken at 60 (pp. 166-170, 286).

What he believed to be the reason of this fluctuation is testified to by Mr. Ernst, one of the trustees in bankruptcy. His testimony best expresses his belief:

> "I felt that Mr. Keene violated his duty as syndicate manager for the Hocking Pool. I felt that he traded in stocks of the Hocking Company as an individual to his own profit, in violation of his rights and duties as manager of the syndicate. I believe that he went short of the market when he knew, or had reasonable cause to believe, that there was going to be a drop in the market of that

> stock. I believe he sold his own stocks to the syndicate, and sold short stock, and delivered some of his own long stocks to the syndicate at high prices, and covered his transactions at bottom prices" (p. 135).

As the result of this belief the trustees in bankruptcy brought two suits against Mr. Keene, the pleadings of which are in evidence (Defendant's Exhibits H, I, J and K, pp. 475-511).

In regard to the transaction out of which the alleged cause of action arose, the appellant's answer, after denying that it was an unsecured creditor of said firm of J. M. Fiske & Co., in the sum of $500,000.00 as alleged in the bill of complaint, pleads the contract of November 8th, 1901, and claims that it was entitled to said deposit and said securities under said contract as governed by the general usage which prevailed in such transactions in the financial district in New York City. It is also denied that at the time of the receipt of said cash and securities the appellant knew or had reasonable cause to believe that the bankrupts were insolvent or that it was intended to give or receive any preference (pp. 15-22).

According to the general custom prevailing among stock brokers dealing through the New York Stock Exchange securities sold on one day are deliverable on the next business day, payment being made therefor on delivery. It frequently happens that securities sold by a broker have been placed by him as security for loans, and to obtain such securities for delivery the broker is obliged to pay off such loans, or at least so much thereof as is sufficient to release the securities he wishes to deliver. In order to obtain funds to pay such loans and release the securities sold, or to pay for stocks and bonds purchased, so as to make delivery to those to whom they have been sold, or for whose account they have been purchased, either

cash or credit from the banks is absolutely necessary (Op. Ward, Circuit Judge, p. 516). The transactions are of such exceptional magnitude that it would not be possible to conduct the business either on a cash basis or with the private capital of the brokers engaged in it (Report of Special Master, p. 299).

The necessity for these "day" loans is explained by the Special Master. As he points out, brokers are able to pay for securities which they have purchased only by the proceeds of the securities which they sell. Deliveries of purchases and sales proceed simultaneously, consequently the broker in view of the magnitude of the volume of business and the limitations of private capital is obliged to obtain temporary funds to pay for securities deliverable to him while he is receiving the proceeds of the securities which he is delivering to his purchasers. Business must be done between 10 A. M. and 3 P. M., and it is impossible for any one broker to so arrange his business that he may make deliveries upon his contracts to sell before deliveries under contracts to purchasers are made to him. While, therefore, it is necessary for the broker to have financial assistance in the shape of a "day" loan to pay for stocks delivered to him, it is equally necessary that he have the use of the stocks delivered to him so as to make deliveries himself, and this the banks making the loan permit him to do. With the net results of the proceeds of his entire clearance he pays the "day" loan in one or the other of the manners described above (pp. 299 and 300).

In order to meet the very apparent exigencies of the business by supplying to the brokers a temporary credit sufficient to their needs, a general custom exists among brokers and their respective banks whereby each day the bank makes a loan to the broker who is its customer, which loan is known as a "day" or "clearance" loan. Such loans are made

without interest and are payable at or before the close of business on the day on which they are made. This loan is made each morning and is passed to the credit of the deposit account of the broker requesting it. The evidence of the indebtedness varies somewhat with the various banks, in some insititutions the broker delivering to the bank a demand note, in others, as in the case at bar, a mere request to loan, which is supplemented, however, by a loan agreement similar to that in evidence herein (Report of Special Master, pp. 279, 280 and Defendant's Exhibit A, p. 452).

The loan having been made and the credit given to the broker upon the bank's books, the broker proceeds to the transaction of his day's business, delivering his checks drawn against the proceeds of the loan thus obtained, either to pay off loans and release securities which he is under obligation to deliver, or else to pay for securities which he has contracted with other brokers to receive. Sometimes a broker may receive and pay for securities with the proceeds of the "day" loan, and taking the securities thus acquired, make another loan upon them as collateral and use the proceeds thereof in the further transaction of his business. As soon as the broker delivers the securities thus released and obtains payment therefor, or hypothecates securities purchased and obtains the proceeds of the collateral loan made thereon, the checks given either by the customers, the brokers, or the bank or trust company making the collateral loan, as the case may be, are deposited in the general account of the broker in the bank with which he has made the "day" loan. These deposits often begin to come into the bank within a few moments after the stock market opens in the morning and the broker is expected to make the deposits as quickly as he receives his checks (pp. 113-116, 244, 266, 268, 294 and 295).

If, in the course of the day's business, the broker

has received therefrom and has deposited in his account, checks aggregating an amount equal to or greater than the amount of his morning "day" loan, he draws against the account a check for the amount of the said "day" loan and delivers the same to the bank. For this he receives his note marked "paid" and the check thus given going through the books as a charge is debited to his account, thus cancelling the credit of the morning and the loan is thus paid (pp. 218, 294 and 295). If on the other hand, the broker's transactions during the day have so depleted his bank balance that he has not in bank an aggregate amount sufficient to repay the "day" loan, the broker takes securities released to him by the use of the money advanced as the "day" loan and negotiates a collateral loan either with some other bank or person, or else an independent collateral loan is sometimes negotiated with the bank which has made the "day" loan. In any event, the collateral loan being made, the broker would take the proceeds thereof, and depositing the same in his account with the bank which had made the "day" loan, would draw his check for the amount of the "day" loan against his reinforced balance and deliver the same to the bank. The check goes through the broker's accounts on the books of the bank cancelling the credit given in the morning, as above described, thus paying the "day" loan.

Should the broker be unable to make a collateral loan, recognizing the lien of the bank upon the securities cleared by the use of the proceeds of the "day" loan, to the possession of which at any time during the day the bank is entitled, he actually delivers the securities so cleared by the proceeds of the "day" loan to the bank as security for his indebtedness (pp. 518-519).

The reason the banks have come to prefer the

broker to make a collateral loan and deliver them the proceeds under such circumstances as last described, rather than taking securities directly, so as to reduce to possession the security which would protect the deficit in the "day" loan, is explained by Mr. Alexander. "Day" loans do not draw interest and collateral loans do and the banks regard it solely as a matter of good business to have their money drawing interest over night (p. 254).

In spite of the finding of the Special Master to the contrary (p. 297) the record shows two instances in which the firm of J. M. Fiske & Company made collateral loans with the appellant, on security purchased by the use of the bank funds and depositing the proceeds of these loans to their credit, drew their check against their balance thus enlarged to pay the "day" loan (Plaintiffs' Exhibits 23 and 27, pp. 403-415, 418-426). One of these loans, one amounting to $5,000, was made on January 7, 1910, and was secured by 100 shares of Wabash Ry. Co. preferred stock and 20 shares of United States Steel Corporation common stock (pp. 405, 419), and one amounting to $15,000 was made on January 18, 1910, and was secured by 200 shares of United States Steel Corporation, common stock, 10 shares of stock Sheffield Steel and Iron Company, common stock, and 10 shares of Chicago & Alton Ry. Co. common stock.

The 100 shares of Wabash Ry. Co. preferred (Ctf. 20346) were received January 7th, 1910, from Franke, Thompson and Robb against the delivery to them of J. M. Fiske & Co.'s check No. 59125 drawn on the appellant; the 20 shares of the United States Steel corporation common (Ctf. F 254435) were received from Carlisle, Mellick & Co. against check No. 59120; the 200 shares of United States Steel Corporation common (Ctfs. G 324961/2), hypothecated January 18th, 1910, were received

partly from H. N. Whitney and Son and partly from B. L. Smyth & Co. against checks Nos. 59482 and 59483, and the 10 shares of Chicago and Alton Ry. Co. common (Ctf. A 1387) were received from C. M. Schott, Jr. & Co. against check No. 59478 (pp. 404-5, 419-20).

The 10 shares of Sloss Sheffield Steel and Iron Co. common (Ctf. B 7244) were received by the brokers from transfer on January 11, 1910, and were taken from their "Box" on the day of its hypothecation (pp. 404-5). The record is not extensive enough to permit of its being traced to its original acquisition by the brokers.

Mr. Alexander also testified to an instance where a similar *modus operandi* was followed (p. 252), and Mr. Carse, on cross-examination, recalled a like transaction at the Hanover National Bank, but was not asked for any details (p. 230).

Assignments of Error.

(Record, pp. 522-528.)

The assignments of error to the Circuit Court of Appeals may be treated in groups.

1st to 4th inclusive. The Court erred in affirming the decree of the District Court, awarding costs against the appellant, and remanding the cause to the District Court with directions that the decree of January 9th, 1912, be affirmed.

5th. The Court erred in holding that the transfer and delivery by the firm of J. M. Fiske & Co. of the stocks, bonds, securities and moneys referred to in the bill of complaint, to the appellant on January 19, 1910, were and are unlawful preferences within the meaning of the Bankruptcy Act and are void, and in setting aside the said transfers and deliveries.

6th to 8th inclusive. The Court erred in holding that there was competent proof of the financial status of J. M. Fiske & Co. and the individual members thereof at the time of the delivery of the securities to the appellant's representative on January 19, 1910; and in holding that the books of J. M. Fiske & Co. were admissible as competent, material and relevant evidence to prove the insolvency of said firm, and that the same were properly proved.

9th and 10th. The Court erred in holding that at the time of the receipt by the appellant of the several items of securities and cash it had reasonable cause to believe that the firm of J. M. Fiske & Co. and its individual members were insolvent.

11th to 21st inclusive and 33d. The Court erred in holding that on the facts as revealed by the record and as found by the Special Master and District Judge the appellant must be deemed in law to have had sufficient knowledge of the fact that said firm was insolvent, and that having such knowledge, to have had reasonable cause to believe when it received such transfer that the fact of the transfer would have been to enable it to obtain a greater percentage of its debts than any other creditor of the same class.

23d, 30th, 31st and 44th. The Court erred in failing to hold that the appellant had an enforceable equitable lien or claim or right to or in the property, cash and securities received by it on January 19th, 1910.

22d and 24th to 29th inclusive. The Court erred in its construction of the contract between the appellant and the firm of J. M. Fiske & Co. and in its failure to read said contract in accordance with the

custom of the financial district in the City of New York as revealed by the record.

32nd. The Court erred in holding that the fact as found by the Special Master and by the District Court of the United States was that the common stock of the Columbus and Hocking Coal and Iron Company did not have any substantial value on January 19, 1910, and that its price was maintained by a pool organized to inflate it.

34th and 35th. The Court erred in holding that the appellant is a general creditor of the said firm of J. M. Fiske & Co.

36th to 39th inclusive, 42nd and 43rd. The Court erred in holding that a condition did not exist out of which any custom or usage whereby the making and payment of "day" or "clearance" loans was governed, and in failing to hold that the custom or usage did in fact exist and that "day" or "clearance" loans made by and between banks and stock exchange brokers in the City of New York, N. Y., were governed by said custom which was shown by the record to exist as a matter of fact.

40th and 41st. The Court erred in holding that the result of the day's transactions leads to the payment of the "day" loans and not to their security and that such is the understanding and intent of both borrower and lender, and in its failure to hold that the intent of both borrower and lender is to secure said "day" loans at the time they are made, and that the same shall remain secured at all times until paid, and that the lender shall from the time the loan is made have a lien or claim upon or interest in said funds and the avails thereof, no matter what form they shall take, until the payment and discharge of said "day" loans.

45th and 46th. The Court erred in holding that the appellant had no right to retain the sum of $54,048.08 constituting the deposit made by J. M. Fiske & Co. on January 19, 1910.

47th and 48th. The Court erred in holding that the appellant never received said deposit as a bank and that said firm of J. M. Fiske & Co. never had the right to draw against said sum, and in failing to hold that the relation of banker and depositor was established between the appellant and said firm and remained absolute until the time of the failure of said firm, subsequent to the time of the making thereof, when the right of set-off was exercised by the appellant pursuant to the agreement existing between the said appellant and said firm of J. M. Fiske & Co., and pursuant to its rights as a bank to which its depositor is indebted.

49th to 53rd, inclusive. The Court erred in holding that the deposit of said sum constituted a preferential payment by the said firm of J. M. Fiske & Co. to the appellant, under the Bankruptcy Act of 1898, as amended, that when said deposit was received the appellant had reasonable cause to believe that it was intended by said firm of J. M. Fiske & Co. to give the appellant a preference, that the appellant treated said deposit of $54,048.08 as a partial payment of the indebtedness of J. M. Fiske & Co., and that the transfer of said sum was void and that the appellees are entitled to set the receipt of said sum aside in accordance with the prayer contained in their bill of complaint.

POINTS.

FIRST POINT.—Under the agreement of November 8th, 1901, as amplified and modified by the general custom, which was proven, the appellant acquired an equitable lien upon, or right in or to the money constituting the "day" or "clearance" loan and in or to all securities or proceeds of whatever nature realized, cleared or obtained possession of by J. M. Fiske & Co. by the use of the said "day" or "clearance" loan in so far as such securities or proceeds were or could be identified as so realized, cleared or reduced to possession.

I.

"Day" or "Clearance" Loans.

On November 8, 1901, the firm of J. M. Fiske & Company and the appellant's predecessor entered into a certain agreement. (Defendant's Exhibit A, p. 452.) In connection with that agreement and as part of the contract made between the parties for conducting business between themselves, the so-called "day" or "clearance" loans were made for the purpose of extending credit to the brokers by means of which they could clear their securities and obtain possession thereof for delivery to their various customers (pp. 111-2; 219-220; 236, 262-70 and 280).

These "day" or "clearance" loans were a matter of daily occurrence from the date of the agree-

ment up to and including January 19, 1910 (pp. 81, 85).

On the morning of each business day the brokers sent to the bank a *written* request for a loan, which request was substantially as follows, differing only as to the date and amount of the loan requested.

"NEW YORK, , 19 .

MECHANICS NATIONAL BANK,
New York City.

Please loan us today $. Crediting this amount to our account and oblige,
J. M. FISKE & COMPANY."

The form of these notes as used among the several banks making such loans varied somewhat. Some institutions required demand notes while others used requests to loan similar to the one quoted above (pp. 247; 262-266). In one form or another, however, a loan agreement similar to the one in evidence was always an integral part of the transaction (pp. 279-80).

Pursuant to the written request thus made the bank would credit the account of the broker with the amount requested, thus increasing the amount on deposit to his credit by the amount of said "day" loan. Against his account the broker would then draw and have certified his checks, which checks were used by the broker either for the purpose of clearing or obtaining possession of securities which he was under an obligation to deliver to his customers on that day. As soon as the broker delivered the securities and obtained payment therefor, the checks given by the customers or other brokers in payment for securities delivered would be deposited by the broker with the bank in the broker's account. These deposits often began to be made within a few moments after the delivery of securities commenced at 10 o'clock in the morning, at which time the Stock Exchange

also opened, and the broker was expected to make the deposits as quickly as he received them. In many cases where the agent of the broker or so-called "runner" delivered the securities to the customer or for the benefit of the customer and received payment therefor, the check received by him was taken by the "runner" directly to the bank and deposited to the broker's credit without being taken to the broker's office (pp. 113-4, 115, 217-8, 221, 227, 232, 236, 243-4, 250, 266-8).

While no independent account was kept in which the "day" or "clearance" loans were credited separately from the broker's general account, it was expected and understood that no portion of such credit was to be used for any purpose other than to clear securities, although the broker was at liberty to draw against the balance standing to the credit of his account in excess of that derived from said "day" or "clearance" loan to pay the general expenses of his business and to meet the general obligations thereof (pp. 255, 266-7).

The "day" or "clearance" loan was paid and satisfied each day and no interest was charged thereon by the bank (pp. 233-4).

If at the time of the ending of the day's business at three o'clock the broker had deposited in his account checks aggregating an amount sufficient to repay the "day" loan he would draw against the account a check for the face amount of the loan and deliver the same to the bank. This check would be debited to his account and the loan thus paid (pp. 218, 236, 267-8).

If the amount of checks deposited by the broker in his account during the day did not aggregate an amount sufficient to repay the "day" loan, the broker would take the securities released by the use of the money advanced by the bank, constituting a part of the "day" loan, and negotiate a collateral loan with some other third person, or an independent colla-

teral loan would be negotiated with the bank itself. The broker would be paid the proceeds of the collateral loan, depositing with the person or institution making the loan sufficient collateral to secure the loan. On this loan he would be charged and be compelled to pay interest. The proceeds of the collateral loan would then be deposited in the account of the broker with the bank, and after such deposit the broker would have in his account sufficient funds to repay the "day" or "clearance" loan. He would then draw against his account thus reinforced a check for the face of the "day" or "clearance" loan and thus pay and cancel the same (pp. 83-4, 119, 121, 222, 230, 240-241, 253-4, 268).

It is the contention of the appellant that the evidence also shows that if the broker has not deposited sufficient checks representing securities cleared by the "day" or "clearance" loan to repay the same, or is unable to negotiate a collateral loan on such securities so that he may use the proceeds thereof to pay off the "day" loan, recognizing the lien of the bank created under the agreement between it and the broker and its right to the possession of the securities obtained by reason of the use of the money advanced by the bank in the morning for the so-called "day" or "clearance" loan or any portion of it, he delivers the same to the bank.

While it is true that in some cases inquiry is made as to just what securities the broker expects to clear, this practice is generally abandoned after the borrower has clearly established his credit on a satisfactory basis (pp. 224, 232-233). These "day" loans, once the line of credit is established, are based on the average daily requirements of the broker as determined by his average course of business (pp. 238-239). When a new account of this sort is opened, the banks inquire very thoroughly into the membership of the firm, the amount of capital in their business, the character of the

business which they expect to do and the nature of the securities they anticipate dealing in, and with whom they expect to deal (pp. 224-5, 232-3). The reason for this is explained by Mr. Alexander, who testified:

> "We are making advances to put them in possession of these very stocks; if they couldn't deliver they might have to come back and deposit the securities with us; it might be a forced over-night loan, and we would want to know whether they were such collateral as we would loan on. * * *
>
> We are looking to the collateral back of these daily clearance notes to the same extent that we are looking to the collateral back of our over-night loans; the basis in the bank is exactly similar" (p. 239).

II.

Evidence of the agreement under which the loan was made.

The method of doing business between the appellant and J. M. Fiske & Co. was governed by the agreement entered into between the parties evidenced in part by Defendant's Exhibit A (pp. 452-454) and by the general custom, which we submit was proven.

The general custom was proven by Mr. Roe on his cross-examination (pp. 113-121); Mr. Carse, one of the Vice-Presidents of the Hanover National Bank (pp. 217-234); Mr. Alexander, who held a similar office in the National Bank of Commerce (pp. 234-261), and the stipulation entered into (pp. 262-270).

Mr. Roe was specifically asked, and stated that there was a custom prevailing in relation to these "day" loans that was different from that which was expressed in the agreement, Defendant's Ex-

hibit A (pp. 112-115). The agreement by its very terms gave to the bank certain rights "*in addition to those created by the circumstances from which such indebtedness may arise*" (p. 452). He also testified that it was customary for the brokers to cover their "credit" or "day" loans as fast as checks were received by the broker, such checks being those which were received upon the delivery of stocks, meaning the stocks taken up (pp. 115-116), and again that the custom was for the brokers to make deposits at the bank as soon as their checks are received, or else to deposit "the securities to cover the amount of the advance made for the purpose of clearing their stocks" (p. 115).

MR. CARSE, in stating the difference between a "clearance" and "demand" loan, testified:

> "The rule is that loans are not made to Stock Exchange houses without collateral. The nature of their business is such that the thing which is paid for with the money which is loaned them is in shape to deliver to the lender, and so the lender requires it in the form of securities as collateral; so that on ordinary loans to run for any length of time they are always secured by collateral. In the case of these loans, as the collateral is in transit—that is to say the broker has to deliver it to someone else to get money to repay the loan, it has developed a form of a trust, and the clear understanding implied between the broker and the bank is that whatever the broker obtains by the proceeds of the loan given to him is held in trust for the account of the bank, and is to be accounted for during that day, it being clearly understood that in no case shall this accommodation run beyond the day on which it is granted. If a broker pays for stocks or bonds, it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply retains possession of them long enough to make de-

> livery and get payment; if the proceeds of the credit are used to pay for loans which are already secured by collateral, the bank expects that collateral to be placed in another loan, which might either be made with them or with some other institution, and the proceeds of that loan would be for this temporary loan, as we generally call it. These things are known as temporary day loans for the purpose of clearing the broker's business" (pp. 219-220).

He also testified:

> "The understanding is that they shall pay for these loans with good certified checks, and not by forcing loans on the bank; but there have been cases in times of stress where the broker has not been able to arrange the loans and so he has brought into the bank the securities which were paid for by the credit given to him, and the bank has made him a separate loan on that, and with that loan paid off the temporary loan which had been made in the morning" (p. 222),

and also that the understanding to which he referred was the ordinary usage and ordinary method of doing the business (p. 222).

And again:

> "If the securities which a broker intends to clear are not such securities that we would accept as collateral to a regular call loan, we refused to grant the accommodation for clearing them, the idea there being that the security for our money is the thing which is being paid for by our credit, and we want to have something to make that advance secure" (p. 225),

and when asked the following question made the following answer:

> "Q. Suppose you found one of these stock exchange houses using the proceeds of one of

> these clearance loans for purposes other than making his clearances, would that influence your conduct in dealing with him in the future?
>
> A. We would stop the accommodation at once, and if this were discovered before checks had been certified, we would refuse to certify the checks" (p. 226).

On cross-examination he testified that he recalled an occasion where the "day" loan was not paid and the bank, taking the securities made a collateral loan on them and used the proceeds to pay off the "day" loan (p. 230).

MR. ALEXANDER testified that the bank wanted to know the character of securities in which the broker dealt, saying:

> "That is the vital thing, because we are making the advance to put them in possession of these very stocks; if they couldn't deliver, they might have to come back and deposit the securities with us; it might be a forced over-night loan and we would want to know whether they were such collateral we would loan on. We would not know the securities they had were securities we would be willing to loan on" (p. 239).

On cross-examination he testified where a "day" loan was not paid during the day as follows:

> "I got a trust receipt that night for the securities he had in the vault; then I made a regular loan against the particular trust receipt and cleaned up that day loan" (pp. 252-253).

And that the reason why the securities themselves were not delivered was for the reason that the broker said he could not get them and therefore obtained and gave to the bank a trust receipt specifying the securities.

His reason for making the collateral loan rather than allowing the "day" loan to run over night is manifest: "Day loans do not carry interest, and I wanted to get the one day's interest" (pp. 252-254).

The stipulation between the parties is cumulative and states:

> (*a*) "That the said day or clearance loans were paid off by his [the broker's] check or checks drawn to the order of the bank, at the close of the day. That during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after the same were received; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for him to obtain a demand or time loan at the Stock Exchange or from some bank or banker for that purpose. It sometimes happened that some loans were effected through brokers on the Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid. The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and howsoever those securities were acquired by him; or he, the broker, might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan would be credited to his general account with the bank and the so-called day or clear-

ance loan would be paid at the close of the day by check drawn against this account" (pp. 267-268).

(*b*) "But it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities" (p. 267).

(*c*) "If the officers of the Mechanics & Metals Bank and other banks doing this day or clearance loan business by means of a continuing loan agreement and a request to loan, were called they would testify that this day or clearance loan business was done in this manner and that they would testify the loans were liquidated in the same manner as they were in the banks where they were made upon a demand note, and that the stipulation with respect to the testimony of Messrs. Carse and Alexander and other witnesses apply as far as the liquidation and payment of the loans are concerned; and that the credit to the borrower from the bank under the system adopted by the Mechanics & Metals Bank and other banks using that system or form of business is in the same general manner as testified to by Messrs. Carse and Alexander" (pp. 269, 270).

From the stipulation it further appears that had other bankers been called they would have testified substantially in the same manner as Messrs. Carse and Alexander and that if members of stock exchange houses to whom the banks made the "day" or "clearance" loan had been called they would have also testified in the same manner (pp. 262, 266).

The Special Master found that this testimony failed to show the existence of any custom by which the securities obtained with the proceeds of the "day" loans were pledged as security for any part of such loan. The learned District Judge, after stating the appellant's position, correctly analyzes the evidence apart from Mr. Carse's testimony (p. 338) and in discussing that portion of the proof, he con-

cedes that it supports the appellant's contention, but disregards it, stating that he does so for two reasons:

1. It is "incompetent since it, in effect, usurps the Court's function, which is to decide what was the 'clear understanding'" (p. 343).

2. "When, therefore, Carse says what is the clear understanding of the legal effect of the practise, it is of no consequence, since that understanding was expressed only in acts, the natural meaning of which does not imply any trust relation, as he, and perhaps they, may have supposed. Had they said that they meant to create a trust, such a trust would arise, but when they merely adopted a course of conduct, the supposed results of that conduct are immaterial" (p. 344).

We submit that the construction of the learned District Judge is entirely too narrow.

A reading of Mr. Carse's testimony shows that while he used the expression "it was the clear understanding" (p. 221), he was testifying to what the parties had agreed was to be done. He unfortunately uses the language which a layman generally employs in attempting to describe what transpires between two persons, who are making an oral contract. His testimony was in effect the same as though he had stated that when application was made for the "day" or "clearance" loan, the officer of the bank to whom such application was made had said to the broker applying for such "day" or "clearance" loan that the money would be advanced and credited to his account if the broker would agree;

(*a*) that he would use the proceeds for the sole purpose of clearing securities;

(*b*) that the bank was to have a lien upon all securities of which the broker obtained possession by the use of said moneys, or the avails thereof, or

the right to have such securities or their proceeds used in the repayment of said "day" loans;

(*c*) that in the event of repayment not being made, the same day, either by sending around sufficient deposits or by providing sufficient moneys by procuring the usual Stock Exchange collateral loans, the specific securities, possession of which had been obtained by the broker by the use of said moneys, would be held by said brokers for the benefit of said bank or deposited with said bank; and that after such statement had been made by the representative of the bank, the broker had said that he agreed to it.

Furthermore, the testimony introduced on behalf of the appellant shows that for a long period of time, J. M. Fiske & Co. had carried on this business by the use of the moneys furnished by the bank in a certain way which was well known to the bank, and thus established a well recognized course of dealing. This course of dealing would become a part of any contract, agreement or arrangement made between the bank and the broker, without any specific reference being made thereto.

The record discloses that in every instance (it is true that they were probably very few in number) where the broker was unable to repay the "day" or "clearance" loan, the specific securities, of which the broker obtained possession by the use of said "day" loan, were lodged with the bank or a trust receipt given therefor evidencing the fact that such securities were retained by the broker for the bank's sole benefit.

III.

Rights of Bank.

The written agreement of November 8, 1901, between the Bank and J. M. Fiske & Co. provided among other things as follows:

"That the undersigned, [J. M. Fiske & Co.]
* * * hereby agree with the said Bank

that whenever the undersigned shall become or remain, directly or contingently, indebted to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or in any other matter whatsoever, or upon any other claim, the said Bank shall then and thereafter have the following rights, *in addition to those created by the circumstances from which such indebtedness may arise against the undersigned* * * * namely:

1. All securities deposited by the undersigned with said Bank, as collateral to any such loan or indebtedness of the undersigned to said Bank shall also be held by said Bank as security for any other liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description left with said Bank for safe keeping or otherwise, or coming to the hands of said Bank in any way, as security for any liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be *lodged* with said Bank as security for all existing liabilities of the undersigned to said Bank, approved collateral securities to an amount satisfactory to said Bank; * * *" (pp. 452-3). (Italics ours.)

It is noteworthy that the provision giving the bank certain enumerated rights "in addition to those created by the circumstances from which such indebtedness may arise against the undersigned" is also found, practically verbatim, in the form of agreement used by The First National Bank of the City of New York (p. 263) and in the note of The Hanover National Bank of the

City of New York (p. 441). In the form used by the National Bank of Commerce in the City of New York it is expressly stipulated that the securities obtained by the use of the funds loaned thereunder shall be held in trust for the bank and subject to its lien for the moneys so advanced (p. 444).

Under this agreement and the general custom proven as to the "day" or "clearance" loan, the bank in the first instance acquired a lien upon or right in or to the money constituting the "day" or "clearance" loan which on January 19, 1911, amounted to $400,000.

When the credit of $400,000 was passed to the account of J. M. Fiske & Co. on the morning of that day the bank at that instant acquired the right to demand that it be made good not later than at the close of the business day. It also became entitled to demand that each and every part of said credit was to be used by the brokers only for the clearance of securities, and before any of said credit was so used, the bank had a lien upon or right to appropriate for the payment and cancellation of said "day" or "clearance" loan said sum so credited to the broker's account.

When said sum was used for the clearance of securities, the bank in no way released or lost its lien upon or right in or to said money. There was simply a substitution of property of some kind which took the place of some portion of the "day" or "clearance" loan.

In order that the appellant maintain this lien or right, it must be able to trace said sum so advanced and identify the securities or the proceeds of securities in the possession of the brokers, as coming into their hands by the use of or in the place of said original credit or some part thereof.

From Appendix A hereof it appears that of the securities received by Mr. Roe, all with the single exception of ten shares of Interboro-Metro-

politan Company common stock, had come into the possession of J. M. Fiske & Co., by the direct use of the said $400,000 advanced as the "day" or "clearance" loan on January 19, 1911. The bank's lien upon or right in and to said securities so traced was as absolute as though the original $400,000 still remained to the credit of the broker.

IV.

Authorities.

(*a*) *The contract must be construed in the light of the law of New York.*

The contract was made to be performed in the financial district in the City of New York. It must, therefore, be read in the light of the law of New York.

Richardson v. *Shaw*, 209 U. S., 365.
Hiscock v. *Varick Bank of New York*, 206 U. S., 28.
Humphrey v. *Tatman*, 198 U. S., 91.
Thompson v. *Fairbanks*, 196 U. S., 516.
Skiff v. *Stoddard*, 63 Conn., 198.

(*b*) *The contract is not void as against creditors in New York State.*

The only contracts which are void against creditors in New York State are contracts which are:

(1) in fraud of creditors—

Security Warehousing Co. v. *Hand*, 206 U. S., 415.
Zartman v. *First Nat'l B'k*, 189 N. Y., 267.

(2) void under the statute—

Skilton v. *Codington*, 185 N. Y., 80.

(*c*) *Custom.*

Every business is necessarily governed by the general usages which are recognized among those engaged in it.

"A general custom is the common law itself, or a part of it." And written contracts, by implication, incorporate custom into them.

> *Underwood* vs. *Greenwich Ins Co.*, 161 N. Y., 413, 423-424.
>
> *Newhall* vs. *Appleton*, 114 N. Y., 140.
>
> *Walls* vs. *Bailey*, 49 N. Y., 464, 467-471.
>
> *Botany Worsted Works* v. *Wendt*, 22 Misc. (N. Y.), 156.
>
> *Hostetter* v. *Park*, 137 U. S., 30, 40.

Persons engaged in a particular trade or business are bound to inform themselves as to the customs and usages of such business, hence knowledge on their part will be presumed.

> "If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary."
>
> Per DAVIS, *Justice*, in *Robinson* v. *U. S.*, 13 Wall. (U. S.), 363, 366.

See also

Hazard's Admr's v. *New England Marine Ins. Co.*, 8 Pet. (U. S.), 557.
Hartshorne v. *Union Mutual Insurance Co.*, 36 N. Y., 172.

J. M. Fiske testified that he had been a member of the firm of J. M. Fiske & Co. for "sixteen or seventeen years" (p. 53). This was ample time to fasten on him and his firm a thorough knowledge of the customs of the financial district.

The defense here is based on the *entire* agreement not on any part of it, and the situation of the parties is the same as though the suit had been brought by the original contractors, for their trustees in bankruptcy merely stand in their shoes, and are subject to all defenses to which the original contractors would have been subject.

It follows from the authorities that the proof of custom was competent.

See, also,

Megowan v. *Peterson*, 173 N. Y., 1, 5 and 6, and cases cited.
Nightingale v. *J. H. & C. K. Engle, Inc.*, 141 App. Div. (N. Y.), 386, 389.

Furthermore the existence of the custom was sufficiently proved as a matter of *fact*. Messrs. Roe, Carse and Alexander all testified as to how these advances were made, and the stipulation expressly provides that if officers of other banks doing a similar business as members of stock exchange houses who obtained similar advances were called, they would have testified to the same effect as Messrs. Carse and Alexander (pp. 262, 266).

In spite of the conclusion reached by the learned District Judge to the effect that the bank by its contract deliberately predicated its lien on possession, it is significant that the word "delivered" is not used in the written agreement of

November 8, 1901. If the contract had involved a question of the bank's right to demand *delivery*, which term might be construed in the case of personal property, which was the medium they were dealing with, to involve the notion of passing title, surely the contract would have used the word. The use of the word "lodged," however, does not carry with it the same legal significance as does the word "delivered," and the use of the former word clearly recognizes the custom, the fact that the bank's title and right to demand actual possession was secured, and that the brokers' possession was possession for the moment and that was all.

As expressed by the testimony of Mr. Carse the brokers had possession of the securities "in transit" (p. 219). This being so it is apparent that the contract of November 8, 1901, when accompanied with a request for an advance, such as was delivered on the morning of January 19, 1910, did not state the entire agreement, and it has always been competent for a party sued by his promisee to show by parol evidence that the design and object of a written instrument are different from that which its language, if alone considered, would indicate.

Juilliard v. *Chaffee*, 92 N. Y., 529, 535, and cases cited.

The rule is there laid down by DANFORTH, *J.*, as follows, pages 535 and 536:

> "The apparent obligation incurred by the defendant under the paper put in evidence by the plaintiff, was to pay the sum named upon demand in consideration of so much money then borrowed; but the evidence disclosed that it was only part of a prior parol agreement, by the terms of which the payees were to advance money in anticipation upon debts owing by them, and on the defendant's promise that it should be so paid in discharge of those debts, and which also provided for a return of the paper to the defendant when the money was so applied. The note did not

> constitute the agreement, nor is it set out in the complaint as the foundation of the action. It is evidence of part of the agreement, and when relied upon by one party, the other might properly show in defense, the whole transaction."

See also

Grierson v. *Mason*, 60 N. Y., 394.

The written contract provides that the bank shall have certain rights therein defined "*in addition to those created by the circumstances from which such indebtedness may arise*" (*p. 452*). Broadly speaking, the written agreement deals solely with property in possession. It makes no specific reference to any rights it may have to property out of possession and yet it refers to certain rights "created by the circumstances from which such indebtedness may arise." Manifestly the proof of the custom may be shown under this direct reference to other rights in addition to those specifically quoted.

The evidence is entirely within the rule laid down by Mr. Justice Nelson in *Oelricks* v. *Ford*, 23 How. (U. S.), 49, at p. 63:

> "This proof is admissable in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation, and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. *So where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning.* [Italics ours.]

(d) *Equitable Lien.*

The doctrine of "equitable liens" is now thoroughly established. We have been unable to find any better statement of the nature of the right or

of its origin than that contained in Pomeroy on Equity Jurisprudence:

> "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, *or fund, therein described or identified*, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. * * * The doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done." [Italics ours.]
>
> *Pom. Eq. Jur.*, 3rd Ed., Sec. 1235.

This definition has been adopted as law verbatim by this Court in the opinion of the learned Chief Justice in

> *Walker* v. *Brown*, 165 U. S., 654, 664-5.

And by the lower Federal Courts in

> *Goodnough Mercantile & Stock Co.* v. *Galloway*, 156 Fed., 504, 510.
>
> *Howard* v. *Delgado & Co.*, 121 Fed., 26, 30.
>
> *Chattanooga Nat'l Bank* v. *Rome Iron Co.*, 102 Fed., 755, 758.

The origin of the doctrine is explained by the same commentator:

> "When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies cannot be carried out, unless the

notion is admitted that the contract creates some right or interest in or over specific property, which the decree of the court can lay hold of, and by means of which the equitable relief can be made efficient. The doctrine of 'equitable liens' supplies this necessary element; and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property right nor interest analogous to property, but only a mere personal right and obligation, equity recognizes *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien,' and which, though not property, is analogous to property and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chatels or securities, *a certain fund*, and the like."

Applying the doctrine, the Chief Justice, then Mr. Justice White, in *Walker* v. *Brown, supra*, laid down the general rule that every express executory agreement, whereby the contracting party sufficiently indicates an intention to make some particular property therein described or identified, a security for a debt or other obligation creates an equitable lien on the property in question.

See also

Ingersoll v. *Coram*, 211 U. S., 335, 368.

The reasoning of this excerpt was also adopted by Judge Bradley in *Hovey* vs. *Elliott*, 118 N. Y., 124.

Perhaps the leading case upon this subject is *Holroyd* vs. *Marshall*, 10 H. L. C., 191. There the learned Lord Chancellor Westbury formulates the following definition:

> "In Equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance.
>
> "* * * And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of Equity would direct to be specifically performed."

A party may then by express agreement create a charge or claim in the nature of a lien on property of which he is the owner or possessor, and equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulations.

Ketchum v. *St. Louis*, 101 U. S., 306.
Hauslet v. *Harrison*, 105 U. S., 401.
Carr v. *Hamilton*, 129 U. S., 252.
Fourth Street Natl. Bk. v. *Yardley*, 165 U. S., 634.
Walker v. *Brown*, 165 U. S., 654.
Ingersoll v. *Coram*, 211 U. S., 335.
Hurley v. *Atchison, Topeka & Santa Fe Ry. Co.*, 213 U. S., 126.
Sexton v. *Kessler*, 225 U. S., 90.

Dressel v. *North State Lumber Co.*, 119 Fed., 531.
First National Bank v. *Penn. Trust Co.*, 124 Fed., 968.
Fisher v. *Zollinger*, 149 Fed., 54.
Union Trust Co. v. *Bulkeley*, 150 Fed., 510.
Mills v. *Virginia-Carolina Lumber Co.*, 164 Fed., 168.
In re Farmers Supply Co., 170 Fed., 502.
Goodnough M. & S. Co. v. *Galloway*, 171 Fed., 940.
In re National Cash Register Co., 174 Fed., 579.

If such a contract is shown to exist payments made in pursuance thereof will not be invalidated as preferences by the operation of the Bankruptcy Act.

Humphrey v. *Tatman*, 198 U. S., 91.
Thompson v. *Fairbanks*, 196 U. S., 516.
In re Perlhefter, 177 Fed., 299, 303.

The agreement creating the lien may be either verbal or in writing.

Riddle v. *Hudgins*, 58 Fed., 490.

In the case at bar the learned Circuit Judge concedes that such a doctrine is well established (p. 517) and that the real question is as to whether under the facts as shown an equitable lien does in fact exist.

The doctrine has been uniformly declared and adopted by the New York courts, and lately approved by this court (*Sexton* vs. *Kessler*, *supra*),

and is enforced as against all subsequent claimants except purchasers for value, without notice.

National Bank of Deposit v. *Rogers*, 166 N. Y., 380.
Hamilton Trust Co. v. *Clemes*, 163 N. Y., 423.
Am. Sugar Rfg. Co. v. *Fancher*, 145 N. Y., 552.
Hovey v. *Elliott*, 118 N. Y., 124.
Coats v. *Donnell*, 94 N. Y., 168.
Spring v. *Short*, 90 N. Y., 538.
Husted v. *Ingraham*, 75 N. Y., 251.
Payne v. *Wilton*, 74 N. Y., 348.
McCaffrey v. *Woodin*, 65 N. Y., 459.
Parshall v. *Eggert*, 54 N. Y., 18.
The Bank of Rochester v. *Jones*, 4 N. Y., 497.

In the case of *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 213 U. S., 126, the defendant entered into an agreement with a coal company to supply it with coal. Each month it paid for the coal furnished during the preceding month. The coal company became financially involved, and in order to lend it aid the defendant made advances which were to be credited on account of coal to be mined and delivered in the future. The coal company became bankrupt owing the railway some $57,000 for moneys thus advanced. The railroad applied in the bankruptcy proceedings to compel the receivers to mine and deliver the coal. The District Court denied the relief on the ground that to grant it would constitute an unlawful preference under the Bankruptcy Act. This ruling was reversed by the Circuit Court of Appeals, which in turn was affirmed by this Court, which thus recognized the equitable right of the claimant in the absence of both a lien and an agreement for a lien, merely because the understanding

of the parties was that that the coal should be delivered, and it would be inequitable not to give the railroad the benefit of the understanding.

Speaking of this agreement Mr. Justice BREWER said (p. 132):

> "*To ignore this element* and make the bankruptcy proceedings operate to discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company *would result in destroying the full equitable obligations of the coal company*, and placing the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into this original agreement. While decisions directly in point may not be found, yet see *Ketchum* v. *St. Louis*, 101 U. S., 306-317; *Hauslet* v. *Harrison*, 105 U. S., 401; *Carr* v. *Hamilton*, 129 U. S., 252; *Fourth Street Bank* v. *Yardley*, 165 U. S., 634." [Italics ours.]

The facts in this case reveal that the element of the existence of a contract which equity will enforce which seems essential both under Pomeroy's and Lord Westbury's definitions is lacking. This is overcome, by holding that the bankruptcy courts could recognize and enforce the equitable principle even if an ordinary court of equity could not. On this point Mr. Justice Brewer quotes with approval from the opinion of Circuit Judge PUTNAM in the Circuit Court of Appeals in *In re Chase* (124 Fed., 753, 755).

> "It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant."

The learned District Judge recognizes the extension of the doctrines of equity to aid a claimant in bankruptcy as announced in the *Hurley* case, and differentiates the case at bar from that case by finding that in that case the railroad had "the right to demand from the seller a certain amount of coal in its possession which, though not yet set apart from the bulk, was still definable in quantity. That was a specific interest in a *res* which survived bankruptcy" (pp. 344-5).

In *Goodnough M. & S. Co.* v. *Galloway*, 171 Fed., 940, an action was brought to establish a lien upon certain timber contracts assigned to the complainant. Judge WOLVERTON writing the opinion in the District Court of the District of Oregon states at page 949:

> "The agreement that the Goodnough Mercantile & Stock Company should have security—that is, a present security upon the property—constituted an equitable lien, which attended the property, the timber in the tree, the logs cut therefrom, and the lumber manufactured from such logs, and was effective against all others, save such as might have purchased for value, without notice or knowledge of the existing contractual relations between BUCK and the complainant. 'Equity looks upon things agreed to be done as actually performed.' Buck having agreed that the complainant should be secured for the advances upon certain and definitely specified property, equity will, for the purpose of making the contract effective, deem that the security was actually given, and so treat the transaction. By virtue of the agreement therefore the complainant acquired an equitable lien upon the property designated, and that lien attends the fund in the hands of the trustee in bankruptcy. * * * See *Hauslet against Harrison*, 105 U. S., 401, and the decision rendered in the case at bar on the demurrer to the bill, 156 Fed. 504."

In *Hauslet* vs. *Harrison*, 105 U. S., 401, one Bayer entered into a contract with Hauslet whereby in consideration of moneys advanced by the latter for the purchase of skins he agreed that he would tan, finish and deliver them to Hauslet. Hauslet in consideration of a commission on sales and a further percentage to cover insurance, storage and labor agreed to sell them and put the proceeds less commissions, etc., at the disposal of Bayer. It was further agreed that all skins, whether green, in the process of tanning, or tanned and finished, should be considered as security for refunding the moneys advanced. Bayer became financially embarrassed and unable to proceed with his business, a fact of which Hauslet was aware. In order to carry out the first contract they then entered into another contract whereby Hauslet was to take possession of Bayer's tannery, and run and use it with such materials as would be necessary to finish and sell the skins, the net proceeds to be put to the credit of Bayer after deducting expenses and advances. Bayer four days thereafter filed his petition in bankruptcy. Hauslet took possession of the skins, and Bayer's assignee in bankruptcy brought an action to replevy them.

Held, Replevin did not lie. Bayer had not an unqualified property in the skins. They were subject to a charge in the nature of a mortgage in favor of Hauslet, which was binding upon the parties and upon Bayer's assignee.

Per MATTHEWS, *Justice* (pp. 405-7):

> "We cannot agree with the Circuit Court in the construction, that the only security given to Hauslet by the contract was the personal promise of Bayer that he would perform it. To limit the contract to that extent is to deprive its last provision of all force; for, without it, the personal obligation to deliver the skins when tanned would still remain. *The clause providing for security*

must be held to mean something; and it declares that the skins themselves, before delivery of possession to Hauslet under the contract, for purposes of sale, shall be considered as security.

It was decided in *Gregory* v. *Morris* (96 U. S., 619) that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. *Such a lien is good between the parties, without a change of possession,* even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; *and if followed by delivery of possession, before the rights of third persons have intervened, it is good absolutely.*

Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauslet, and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property, and Hauslet would be protected in his rights, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific points of the agreement.

* * * * *

* * * The transaction of Nov. 6, 1874, though made with knowledge of Bayer's insolvency, and in contemplation of his bankruptcy, if made in good faith, as it is admitted to have been, for the purpose of securing to Hauslet the benefits of the contract of May 29, 1874, was legitimate, and did not constitute, as was held by the Circuit Court, an unlawful preference in fraud of the bankrupt law." [Italics ours.]

In *Dressel* v. *North State Lumber Co.*, 119 Fed., 531, the facts showed that by an express agreement between the president of the defendant, a bankrupt corporation and the First National Bank of Durham, a check for $3,500 was drawn by North State Lumber Co., Limited, by John R. Cochran, President, to the order of John R. Cochran, and endorsed "John R. Cochran, North State Lumber Co., by John R. Cochran, President, Manufacturers' National Bank of Baltimore, Murchison National Bank of Wilmington, and the Fidelity Bank of Durham". This check was presented for payment on October 30th and paid on October 31. The check was given for a specific purpose and was to be placed in the Manufacturers' National Bank of Baltimore to the credit of the North State Lumber Co. subject to the check of J. S. Manning, attorney for the North State Lumber Co. The deposit was made as the basis of a loan they were to make through the bank of deposit. The loan was not made and the funds were withdrawn by the check of J. S. Manning, attorney and placed to the credit of the North State Lumber Co. in the First National bank of Durham to pay the original check of $3,500 drawn on that bank. *Held*, no preference was shown to have been given.

In *Mills* v. *Virginia Carolina Lumber Co.*, 164 Fed., 168, one Franklin was a manufacturer of lumber. On January 4, 1905, he borrowed from the Virginia Carolina Lumber Co. $750 and delivered two notes for $375 each payable at 4 and 6 months. As security therefor Franklin executed to one Sackett, as trustee, a deed of trust covering certain of his property. Subsequently the lumber company and Franklin entered into a contract, by which the lumber company agreed to purchase the entire output of Franklin's planing mill at certain scheduled prices, the lumber to be delivered F. O. B.

at the mill. The terms of payment were that the company was to pay 80% on each shipment upon receipt of invoice and bill of lading, and 20%, less discount, on receipt and acceptance of the lumber. During the month following the making of the contract the lumber company advanced to Franklin various sums of money, aggregating $950 on open account under the contract. The lumber company held no security for their advances. In March, 1905, Franklin filed a voluntary petition in bankruptcy and was duly adjudged a bankrupt. A few days prior to the filing of the petition certain officers of the lumber company had discussed with Franklin his financial affairs and he had told them he was insolvent. The lumber company thereupon demanded of Franklin the delivery of about $1,000 worth of lumber which had been manufactured and was at the mill. After some hesitation Franklin delivered the same. Subsequently the lumber company proved its $750 debt in bankruptcy filing with it the deed of trust which had been given as security therefor. The proof of claim was objected to by the Trustee in bankruptcy on the ground that the lumber company had received $1,000 worth of lumber just prior to the filing of the petition, and that in so doing it had received a preference.

The District Court held that by taking the lumber under the circumstances shown the lumber company had not obtained a preference under the Bankruptcy Act which would defeat its right to prove the claim of $750 for money loaned.

The Circuit Court of Appeals for the Fourth Circuit affirmed the order of the District Court.

District Judge Boyd, writing for the Circuit Court of Appeals, used the following language (pp. 170-171):

> "There was no suggestion that the contract made between the lumber company and Franklin for the purchase of the entire out-

put of Franklin's mill was not a fair one, and one that the law would enforce. The contract was still existing at the time of the adjudication, and whatever lumber was on hand as the product of the mill the lumber company had a right to claim, provided it had complied with the terms which had been agreed upon. If there had been no payment upon the contract of purchase in advance, the lumber company would have been entitled to require the trustee to surrender to it the lumber produced at the mill, provided it complied with the terms of purchase. Having advanced money upon the contract of purchase, the lumber company thereby became entitled to at least as much of the produce of the mill as it had paid for, and it could have recovered so much from the trustee even after the bankruptcy. It is our opinion that, at most, the taking of the $1,000 worth of lumber under a claim by the lumber company that it was entitled to the specific property by virtue of the contract of purchase cannot be construed into a payment upon an existing debt, such as to constitute a preference under the bankruptcy law."

Thus the Courts have come to extend the doctrine far beyond the point of resting upon the designation of any specific securities or fund which would seem to be an essential to the right of enforcement, and recognizing the equities created by the parties themselves in the course of their business transactions will enforce the same in accordance with the intention of the parties. As was said by Mr. Justice Brewer in *Hurley* vs. *Atchison, Topeka and Santa Fe Ry. Co., supra*, the doctrine now has come to stand on the foundation that "Equity looks at the substance and not at the form" of the transaction under examination (213 U. S., 126, 134).

V.

Sexton v. Kessler governs.

This case (225 U. S., 90, reported below, 175 Fed., 535) is controlling, and the case at bar is not distinguishable. Kessler & Co. made a practice of drawing bills of exchange upon their English correspondents. To secure the acceptance of these bills Kessler & Co. set aside, but retained in their own possession, certain securities, a list of which they furnished to the drawees. Under this arrangement Kessler & Co. were entitled to substitute other securities for those which they had set aside. When this was done they duly notified the English house. Kessler & Co. became insolvent, and within the four months' period delivered the securities to a representative of their English correspondents, to whom they were in debt. Suit was brought by the trustee in bankruptcy to set aside this delivery. HELD, that the transactions did not constitute an unlawful preference.

Mr. Justice HOLMES, in the opinion in this Court, says (pp. 97-99):

> "The bankruptcy law by itself does not avoid the transaction. *Thompson* v. *Fairbanks*, 196 U. S., 516. *Humphrey* v. *Tatman*, 198 U. S., 91, 95. A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment. *York Manufacturing Co.* v. *Cassell*, 201 U. S., 344; *Zartman* v. *First National Bank of Waterloo*, 216 U. S., 134, 138. The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute admittedly reserved are inconsistent with a title or lien of the English house in any form. But the decisions of this court and of New York agree that there may be title in a stronger case than this. * * *

* * * So a general promise to give security in the future is not enough. But the present was a more limited and cautious dealing. It was confined to specific identified stocks and bonds on hand, and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal if the remaining securities had arisen sufficiently in value. It purported not to promise but to transfer; and the subject matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York courts. The transaction was not void as against creditors irrespective of attachment as in *Knapp* v. *Milwaukee Trust Co.*, 216 U. S., 545; *Niles* v. *Mathusa*, 162 N. Y., 546. There can be no doubt, as was said by the court below, that before the bankruptcy the English house had an equitable right at least to possession if it wanted it. While the phrase equitable lien may not carry the reasoning further or do much more than express the opinion of the court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien at least, or in other words, that there is no rule of local or general law that takes from the transaction the effect it was intended to produce. *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 213 U. S., 126, 134. When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall* v. *Eggert*, 54 N. Y., 18; *National Bank of Deposit* v. *Rogers*, 166 N. Y., 380."

From this opinion, the opinions below and especially the opinion in the case of *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co.* (*supra*), it is ap-

parent that a bankruptcy court sitting as a court of equity seeks to carry out the intention of the parties without regard to the form or the transaction.

Mr. Justice BREWER, in the opinion in the *Hurley Case* (at p. 134) approves the following statement of the rule made by Circuit Judge Adams in writing the opinion in the Circuit Court of Appeals:

> "If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and treat it as creating an equitable charge or lien however inartificially it may have been expressed."

We respectfully submit that the record shows there can be no doubt that the appellant intended to have the proceeds of the "day" or "clearance" loan used for a particular purpose and to get and have security for such "day" or "clearance" loan, and J. M. Fiske & Co. intended to make use of the credit for the particular purpose and to give security therefor.

Apparently the only distinction between the *Kessler* case and the case at bar is one of form and not of substance, in that in the *Kessler* case certain securities were put in an envelope and a list of the enclosed securities noted on the outside of the envelope. The securities were not taken from the possession of the bankrupt and the bankrupt had at all times the right of substitution and could abstract any of the enclosed securities and substitute others and simply erase the name of the abstracted security and add the name of the substituted security. This same thing could have been done by Fiske & Company had it been necessary or desirable. The bank had a right to take possession of all securities of which the broker obtained possession by

use of the proceeds of the "day" loan, and such securities could at all times be identified and were sufficiently identified to enable the bank to determine upon what it had a lien or to what it had a right.

Suppose a check of $20,000 had been certified and paid to enable J. M. Fiske & Co. to obtain possession of 250 shares of stock. If J. M. Fiske & Co. had placed the certificate for said shares in an envelope and endorsed thereon the name of the bank, the number and names of the shares, and this course had been followed in each instance when a check had been certified and paid and stock received in place thereof, there would be no distinction between that transaction and the transaction in the *Kessler* case.

If when other shares of stock were substituted in the place of those first obtained a notation was made on the envelope the situation would still be on all fours with the *Kessler* case. The proceeds realized for shares were deposited in the bank in part payment of the loan or used to obtain possession of securities. If when such securities were obtained, the certificates were placed in the envelope and the name and number endorsed thereon, the *Kessler* case would still be indistinguishable.

Surely a court of equity having the clear intention on the part of the appellant and J. M. Fiske & Co. to obtain and give security will not permit such intention to be defeated because the form of placing securities in an envelope and endorsing thereon, the name and number of such security has been omitted for the sake of convenience.

VI.

The right of a broker to substitute one kind of security for another does not alter the rights of the parties.

The right to trace specific funds in resulting securities has been recognized and established by this Court beyond all argument. A case akin to that at bar is the case of *Gorman* v. *Littlefield*, 229 U. S., 19, decided at the last term of the Court.

In that case a customer of a defunct broker's house sought to obtain an order directing a trustee in bankruptcy to deliver to him certain shares of stock which it was shown that he had ordered the brokers to purchase outright for him at a time when he had sufficient credit with them to pay for the same. It was proved that in compliance with his orders the stock had been purchased, and that certain specific certificates had been delivered to the broker against the purchase. It was also shown that these certificates had in the course of the broker's business been used by him in the consummation of other contracts, but that the broker had always, and the trustee in bankruptcy on going into possession of the estate had, received sufficient stock of the kind in question to deliver certificates representing the stock so purchased.

Held. The customer was entitled to certificates representing the amount of stock purchased by him, even though the certificates may not be identical with the ones purchased and received upon the execution of his order.

The opinion of Mr. Justice DAY stands on the broad ground that under such circumstances the certificates in fact did not constitute a part of the bankrupt's estate, and that

> "No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate

of property which never rightfully belonged to the bankrupt" (25).

We submit that there is no distinction in principle between the *Gorham* case and the case at bar. The $400,000 credit was given for a particular purpose and the appellant is entitled to the avails of that credit obtained in pursuance of that purpose.

See also

Richardson v. *Shaw*, 209 U. S., 365.

SECOND POINT.—The appellee was entitled to set off the deposit of $54,048.18.

The undisputed evidence is that this deposit consisting of several checks was received some time before 12 o'clock (pp. 80-81). Prior to its receipt Mr. Roe, the cashier of the appellant bank, had been told that there were rumors about the brokers, and had been informed at the bank that no deposit under the "day" or "clearance" loan of that day had been made; Mr. Roe thereupon went to the office of the brokers and asked Mr. Sherwood, a member of the firm, why no deposit had been made, and was informed that there was a deposit on the way around to the bank (pp. 95-96).

The deposit was sent and made in the usual course of business, was a step in the repayment of the "day" or "clearance loan", was a recognition by the brokers of the rights of the appellant, and was an act which had been done precisely in the same way for years past.

This deposit came in while Mr. Roe was out on his errand to J. M. Fiske & Co.'s office. It had not been received when he left the bank (pp. 81, 110, 312, 318).

There is absolutely no proof that the financial

condition of the brokers played any moving part in prompting the making of this deposit at the time it was made, nor was there any evidence to show that it was made with any intention on the part of the brokers to prefer the bank, nor was it made at the request of the bank.

The Special Master found that prior to his departure Mr. Roe had directed the certification clerk and paying teller not to certify or pay any more checks drawn by the firm, and concluded that the deposit having been received after these instructions had been given the relation of banker and depositor was never established, and that the deposit in reality constituted a payment on account of the broker's indebtedness to the bank, and came under the ban of the statute (p. 312). The District Judge reached the same conclusion (pp. 318-9), and the Circuit Court of Appeals concurred (pp. 519-520).

In this connection we point out Mr. Roe's testimony:

> "I gave instructions not to pay any more *until they heard from me*" (p. 88).

When these instructions were given the brokers had failed to make any deposit and had apparently broken the agreement made with the Bank. Later after Mr. Roe's return from the office of J. M. Fiske & Co. he gave final instructions to the tellers "not to pay anything more" (p. 101), but when the deposit was received the only instructions the tellers had were in effect not to allow any activity in the J. M. Fiske & Co. account without consulting with the cashier. There is absolutely no proof that during this period, short as it may have been, the appellant was requested or refused to recognize the relation of banker and depositor between itself and J. M. Fiske & Co., but this does not mean that that relation was

terminated until the cashier finally returned and directed the closing of the account, which was admittedly at a time subsequent to the receipt of the deposit.

Even though the Bank had no right in equity to have all or nearly all of the proceeds of the checks composing the deposit of $54,018.18 applied in part payment of the "day" or "clearance loan". The moment the checks composing said deposit were received by the appellant and passed to the credit of the brokers the funds became the appellant's property and the relation of debtor and creditor was created.

New York County Nat'l Bank v. *Massey*, 192 U. S., 138.
National Bank v. *Burkhart*, 100 U. S., 686.
Cassidy v. *Uhlman*, 170 N. Y., 505, 515, and cases cited.

The relation of debtor and creditor having been created the right of set off was also established.

New York County Nat'l Bank v. *Massey*, 192 U. S., 138.
Joyce v. *Auten*, 179 U. S., 591.
Scott v. *Armstrong*, 146 U. S., 499.
Straus v. *T. N. Bank*, 122 N. Y., 379.

Both under the agreement Exhibit A and the authorities cited above (Point I) the appellant was entitled to have this sum applied in part repayment of the "day" or "clearance loan" and to set off this deposit.

It has been conceded throughout this case that if the broker had continued in the transaction of his day's business that the appellant would have been entitled to call him to account for his day's use of its funds lent to him for a particular purpose. It has been seen that while it may

often happen that his transactions may not be completed in their entirety before 3 o'clock, deliveries begin and contracts are continually being consummated throughout the day, and the banks are constantly urging the brokers to make their deposits (pp. 115-117; 244). In fact this is done to such effect that often the "day" loans are all cleared up by one o'clock. There is no intimation in the record that there was any apprehension as to the financial standing of J. M. Fiske & Co. at the opening of business on January 19, 1910, and they had no trouble in negotiating their "day" loan of $100,000 on that morning. The first the appellant heard of even a rumor of their difficulty was just before Mr. Roe went to that firm's offices shortly before twelve o'clock (pp. 90-91). Columbus and Hocking Coal and Iron Co. common stock opened at 10 o'clock around 88½ (p. 272) and by 11:30 had dropped to 76 (p. 164). In the next half hour the stock became very active and dropped from 76 to 60 (pp. 164-5) and in the course of the day further declined to 25 (pp. 272).

When Mr. Roe went to J. M. Fiske & Co.'s office he was told by Mr. Sherwood that a deposit was on its way to the bank (pp. 95-96). The truth of this statement was ascertained by Mr. Roe on his return to the bank, and if an analysis is made of the deposit itself it will be seen that practically all of it is the proceeds of securities delivered that morning.

Attached hereto marked Appendix B is a tabulation showing the deposit itemized as set forth in the brokers check book (Plaintiff's Exhibit 27). We have also sought to show from the brokers blotter (Plaintiff's Exhibit 23) the purpose for which the brokers received these checks.

If we eliminate the two Schott checks and the exchange charge aggregating $372.20 from the ag-

gregate of $54,420.38 as shown by the check book to have been deposited (see note to Appendix B), it will be seen that of the remaining $54,048.18 all with the exception of the F. Barrell & Co. check of $5,000 and the G. S. Kerr check of $200 was the direct result of the proceeds of the sale of securities. The sum so acquired amounts in the aggregate to $47,456.75.

While we do not in any sense concede that the appellant did not have a right to set off the entire sum of $54,048.18 by virtue of its rights as a banker to whom its depositor was indebted and while we do not concede that it did not also have a right to the entire fund under its agreement Defendant's Exhibit A we point out that if the deposit is split into two parts it had the right to take the $6,591.43 under its right to set-off and was entitled to the sum of $47,456.75 because that same was the proceeds of securities purchased with its moneys.

THIRD POINT.—The case involves no question of actual fraud.

This Court has lately pointed out with great clearness the distinction between fraudulent transfers and transfers which may be set aside as preferential under the Bankruptcy Act.

Van Iderstine v. *National Discount Co.*, 227 U. S., 575.

Coder v. *Arts*, 213 U. S., 223;

> "An attempt to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one"

Per Mr. Justice Day, in *Coder* v. *Arts* (*supra*), at page 241, quoting and approving *Githens* v. *Shiffler*, 112 Fed., 505.

> "The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is *malum per se* and the other *malum prohibitum*,—and then only to the extent that it is forbidden."
>
> Per Mr. Justice Lurton, in *Van Iderstine* v. *Nat. Discount Co.*, 227 U. S., 575, 582.

The bill of complaint it is true prayed that the transfer be set as "preferential, fraudulent and void within the purview of the Act of Congress relating to Bankruptcy" (p. 12). The Special Master, however, decided that the transfer constituted a preference as defined under the Act and was "voidable" (p. 311), and his conclusion was confirmed by the District Judge (p. 350). The decree adjudged the payments to be unlawful "preferences" (p. 352), and the opinion in the Circuit Court of Appeals is based on the same hypothesis (pp. 514-5).

At most if the transaction is to be held preferential the fraud is constructive or technical,

> "consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all cannot be fully paid."
>
> Per Dodge District Judge, in *In re Maher*, 144 Fed., 503, at p. 509, quoted and approved in *Coder* vs. *Arts*, *supra*.

See also

> *Keppel* v. *Tiffin Savings Bank*, 197 U. S., 356.

It follows that in order to entitle the appellees to a decree, all the prerequisites of the Bankruptcy Act must be shown to have been proved in accordance with the rules of evidence, and in such a case fraud is not rightly impugned.

> "While certain circumstances will give rise to an impression of fraud, yet the law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof."

Per Mr. Justice Harlan in
Jones v. *Simpson*, 116 U. S., 609, 615.

FOURTH POINT.—Appellees failed to establish by a preponderance of evidence that the appellant received a voidable preference.

I.

Basis of Decision below.

The learned Special Master after reviewing the testimony stated the rule of law to be that "If a preference is in fact given and the creditor knows, or had reasonable cause to believe that the debtor at such time is insolvent, he will be held to have reasonable cause to believe that it was intended by the debtor to give him a preference" (pp. 287-288), and found on the authority of *Alexander* v. *Redmond*, 180 Fed. Rep., 92 (which he states to be the law in the 2nd Circuit) that

> "Mr. Roe when he received the securities had reasonable cause to believe that the firm of J. M. Fiske & Company were insolvent and that the effect of the transfer of the securities to the defendant would be to enable

it to obtain a greater percentage of its debt than other creditors of the same class" (pp. 290-291).

The District Judge, passing on this phase of the case, said:

> "I do not think it necessary to add anything to the Referee's report except upon two questions: first, the need of proving that the defendant knew that the bankrupts intended a preference: * * *
> Upon the first point *Alexander* vs. *Redmond*, 180 Fed. Rep., 92, is conclusive. It is idle to say that the opinion is obiter. I tried the case below and being of different opinion decided it expressly because the element of an intent was lacking. The reversal was therefore expressly upon that point and the case settles the law in this Circuit" (p. 337).

The learned Judge writing the opinion in the Circuit Court of Appeals did not touch on this branch of the case. His omission to do so we take as a tacit affirmance of the opinions of the District Judge and Special Master.

II.

Statutory Requirements

The Bankruptcy Act, in so far as it applied to the case at bar, in force on January 19th, 1910, defined preferred creditors as follows:

> "Sec. 60. *Preferred Creditors.* (*a*) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect * * * of the * * * transfer will be to enable any one of his creditors to obtain a greater percent-

age of his debt than any other of such creditors of the same class.

(*b*) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person" (32 U. S. Stat. at Large (1903), pp. 799-800, Act July 1, 1898, as amended).

In the same Act it is provided:

Sec. 1 (15). "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

(U. S. Comp. Stat., 1901, p. 3419; Act July 1, 1898.)

Under these provisions, in order to establish a preferential payment which is voidable, the appellees must have proven the following elements:

(*a*) The debtor must have been insolvent within the definition of the Statute.

(*b*) The payment must have been in satisfaction of or on account of an antecedent debt.

(*c*) The payment must have been made within four months before the filing of the petition in bankruptcy.

(*d*) Insolvency must have existed at the time when the payment was made.

(*e*) The payment must have enabled the creditor receiving the same to obtain a greater percentage of its claim than any other creditor of the same class.

(*f*) The debtor making such payment must have intended to give such a preference.

(*g*) The creditor receiving such payment must have known or have had reasonable cause to believe that he was receiving a preference.

(*h*) The insolvent's estate must have been diminished as a result of the transaction.

Coder v. *Arts.*, 213 U. S., 223; aff'g 152 Fed., 949.
Hardy v. *Gray*, 144 Fed., 922.
Calhoun Co. Bank v. *Cain*, 152 Fed., 983.
Tumlin v. *Bryan*, 165 Fed., 166.
In re Neill-Pinckney-Maxwell Co., 170 Fed., 481.
Sparks v. *Marsh*, 177 Fed., 739.
Kimmerle v. *Farr*, 189 Fed., 295.
Remington on Bankruptcy, Secs. 1276 *et seq.*
Collier on Bankruptcy (9th Ed.), pp. 790-1.

The burden is on the trustee to prove by a preponderance of evidence each of these elements.

Barbour v. *Priest*, 103 U. S., 293.
Kimmerle v. *Farr*, 189 Fed., 295.
In re Leech, 171 Fed., 622.

(*a*) THE DEBTOR MUST HAVE BEEN INSOLVENT WITHIN THE MEANING OF THE STATUTE.

The word "insolvent" as construed in this act means that a person shall be deemed insolvent

"Whenever the aggregate of his property * * * shall not, at a *fair valuation*, be

sufficient in amount to pay his debts" (Bankruptcy Act, Sec. subd. 15, *supra*).

It has therefore quite a different meaning from insolvency as ordinarily understood, namely an inability to meet maturing obligations.

Piric v. *Chicago Title & Trust Co.*, 182 U. S., 438, 451.

McDonald v. *Clearwater Short Line Ry. Co.*, 164 Fed., 1007.

Hardy v. *Gray*, 144 Fed., 922.

Remington on Bankruptcy, Sec. 1343, pp. 786, 787.

Collier on Bankruptcy (9th Ed.), pp. 8 and 9.

As pointed out by Judge Putnam, writing the opinion of the Circuit Court of Appeals for the First Circuit in *Hardy* vs. *Gray*, *supra*, the insertion in the statute of the definition of insolvency quoted above

> "Has established so artificial a rule that the usual indicia by virtue of which a man is regarded as insolvent, and, consequently, by virtue of which a creditor may be said to have reason to believe that he is insolvent, or the reverse, became, to a very large extent, of no importance. This fact was illustrated by In re Petingill & Co. (D. C.), 135 Fed., 218, a case which came before us incidentally under the same title in (C. C. A.), 137 Fed., 840. There, marked and numerous indications of insolvency in the natural business sense of the word existed, but it was justly said that 'grounds for reasonable belief in a present inability to pay debts in the course of business are not necessarily grounds for believing that a man's property at a fair valuation is not sufficient to pay his debts' " (p. 924).

It may then well be, as was said in *McDonald* vs. *Clearwater Railway Co.* (*supra*), that

> "the aggregate of the property of the debtor, *taken at a fair valuation*, may be far in excess of the amount of his debts, and still he may not have the current funds with which to meet his indebtedness as it falls due" (p. 1014). [Italics ours.]

That such a condition of affairs does not constitute insolvency under the statute has been clearly recognized by this Court.

In *Piric* vs. *Chicago Title and Trust Co.* (*supra*), Mr. Justice McKenna discusses this requirement of the statute:

> "Inability to pay debts in the ordinary course of business usually accompanies an insufficiency of assets. It may not, of course. At times a debtor's property, though amply sufficient in value to discharge all his obligations, may not be convertible without sacrifice into that form by which payments may be made. *The law regards that possibility.* In this there is indulgence to the debtor, and through him to preferred creditors. But the discussion need not be extended. *The law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences not only to the debtor but to his creditors and to purchasers of his property*" (p. 451). [Italics ours.]

Applying these principles the Circuit Court of Appeals for the Sixth Circuit, in *In re Klein*, 197 Fed., 241, laid down the rule that the valuation for the test of insolvency must relate to the conditions of the alleged bankrupt *as a going concern* and not at the value of its property, as a dead property after the intervention of bankruptcy.

See also

J. W. Butler Paper Co. v. *Goembel* (C. C. A., 7th Circuit), 143 Fed., 295.

The situation in regard to the financial affairs of J. M. Fiske & Co. as they developed in the course of the business day of January 19, 1910, as shown by the record, is but an example of the startling possibilities of the improper manipulation of securities as it may be practiced to-day.

There is no question that the firm was solvent from every point of view at the opening of business on that day, and yet in the course of two hours the market valuation of their securities had shrunk to such an extent that at 12 o'clock noon their balance sheet showed an excess of liabilities over assets at that moment, *i. e.*, that they were insolvent in the popular sense of that word. According to the figures of the expert accountant, Mr. Morse, as revised by stipulation, the assets of the firm at that moment amounted to $747,919.48 while their liabilities were $904,570.02, leaving an excess of liabilities over assets amounting to $156,650.54 (p. 171).

When they announced their inability to meet their obligations on the Stock Exchange, the brokers were carrying either for their own or for customers' accounts 9,740 shares of the common stock of the Columbus and Hocking Coal and Iron Co. (p. 172). This stock at the opening of the New York Stock Exchange at 10 o'clock on that day was quoted at 88½ and by noon dropped to 60, a depreciation in market value of 28½ points a share (p. 285). For a week prior to that time the same stock had been quoted at figures varying from 91¾ to 87¼ (p. 272).

Assuming the values of all other securities as taken by Mr. Morse and revised by stipulation to be stationary, it is a matter of simple mathematics

to ascertain that between the opening at 10 o'clock and 12 o'clock noon, the single item of Hocking stock shrunk in apparent value to the extent of $277,590 and a surplus of $120,939.46 had been converted into a liability of $156,650.54.

The learned Special Master admits the correctness of this computation and observes that the item of assets includes claims against customers assumed to be collectable, "but which are shown by the testimony to be worthless," amounting to $443,835.55 (p. 286), and he accordingly deducts these items.

While the Special Master does not give us the benefit of a direct statement as to just what accounts he deducted as worthless, the brief of the appellees before the Special Master shows this item to have been composed as follows:

A. P. Morrison Account	$34,732.69	
" " Acct. No. 9	34,292.40	
" " Privilege Account	60,083.20	
		$136,108.29
Marcus Schnitzer		14,876.84
Pool No. 2 or 4/1 Account		152,642.79
C. M. Washburn	$21,559.42	
" " " Special Account	4,422.71	
		25,982.13
John Felix		33,652.74
R. F. Little	$14,269.72	
" " " Special Account No. 1	13,973.84	
		28,243.56
G. T. Sullivan Cotton Account	$5,840.00	
" " " Grain "	25,610.50	
		31,450.50
Sarah L. Stevens		3,817.20
Martha L. Stevens		3,836.21
Harry E. Stevens		4,348.83
Charles McLean		8,874.46
Total		$443,833.55

The difficulty with this entire assumption is that it assumes an instantaneous liquidation not only of the brokers but of these accounts as well at 12

o'clock noon on January 19, 1910, irrespective of whether or not that liquidation is based on the "fair valuation" of the statute.

Furthermore the evidence does not support the conclusion that these accounts are all bad.

Mr. Morrison testified that while he had an interest in certain mines and industrial concerns and also in real estate, none of it was available on January 19, 1910 (p. 147). There is no evidence that his affairs could not have been worked out on a fair valuation.

The Pool No. 2 or 1/4 Account is included at $152,642.79. This is a manifest error. The Account itself shows a debtor balance of $259,240.79 secured by 3,300 shares of Hocking stock (Plaintiff's Exhibit 19, p. 402). Should this stock be considered to be liquidated at 60 it would realize $198,000, and the debtor balance is reduced to $61,240.79. At 88½ the same stock was worth $292,050.06, which amply secures the account.

In regard to the John Felix account while Mr. Fiske testified that at the time he was testifying (Nov. 2, 1910) he knew that in January, 1910, Mr. Felix had nothing (p. 56), yet on cross-examination he testified that when he was engaged in business he regarded the account as a live account and an asset of his firm at practically its full value (p. 610). From Mr. Wolf's testimony it would appear that this witness *after the bankruptcy of the brokers had interposed*, denied that they were his transactions and stated that if they were for his account that he could not pay them (p. 72). The matter was not pursued further by the trustees, and there is absolutely no showing that if the accounts were not for the account of Mr. Felix that the true creditor could not make them good.

In regard to the R. F. Little accounts, Mr. Fiske testified that on January 19, 1910, he considered Mr. Little worth something over a quarter of a million

of dollars and that after the failure he found he had nothing. As the witness expressed it "when Hocking broke, he did" (pp. 55, 57). On cross-examination he stated that the account had always been a satisfactory one, that Mr. Little had paid as demands had been made upon him and that on the morning of January 19, 1910, he had regarded the account as a live asset (pp. 61-2). Mr. Wolf had had a conference with Mr. Little in which the latter admitted his debt, stated that there were judgments against him and that he had been examined in supplementary proceedings (p. 72). There is no evidence as to what assets the supplementary proceedings revealed or whether he either could or did pay the judgments or cover his debtor balance with J. M. Fiske & Co.

The proof of the lack of value of the G. T. Sullivan accounts is entirely inferential. On direct examination Mr. Fiske did not think "it was good for much" (p. 58), and on cross-examination he stated that his firm did not approve of him (Mr. Sullivan) and his methods, so asked him to withdraw his account. When his account was closed it showed a debtor balance, but he was never asked to pay it. Mr. Fiske admitted that all he knew about Mr. Sullivan was hearsay gleaned from the newspapers and the fact that he had been arrested and was out on bail indicated nothing as to his financial standing (p. 64). Mr. Wolf was informed he was wholly uncollectable and let the matter drop (p. 74).

In regard to Harry L. Stevens, Mr. Fiske testified that he was an employee of the firm of J. M. Fiske & Co., and had been speculating in Hocking. Prior to the break in that stock his financial standing was good (p. 59). *Subsequent to the failure* of the firm Mr. Stevens told Mr. Fiske he had no money and could not pay (pp. 64-6). He admitted to Mr. Wolf his inability to pay and stated also

that the accounts of Martha L. Stevens and Sarah L. Stevens were really his own accounts, and that they knew nothing of them (p. 74).

Charles McLean was another speculating employee of J. M. Fiske & Co., and Mr. Fiske "considered that he would be able to pay anything he owed" them (p. 57), and regarded the account as an asset prior to January 19, 1910 (p. 62). Mr. Wolf ascertained that Mr. McLean practically admitted the debt and that he had a colorable counter-claim for salary due him. The only evidence of his financial standing was that he was a clerk employed on a salary (p. 74).

That the suspension of J. M. Fiske & Co. was due wholly to the break in Hocking stock is beyond question. The causes for the break are set forth very clearly in the record. Although no mention is made of the fact in the schedules of bankruptcy, the appellees were so thoroughly convinced that this break was due to a breach of trust by Mr. James R. Keene as Manager of two certain pools in said stock, in both of which J. M. Fiske & Co. were participants, that they instituted actions against Mr. Keene (pp. 133-4). The pooling agreements, together with the pleadings in these actions are all in evidence. (Defendant's Exhibits C, D, E, F, G, H, I, J and K, pp. 471-511.)

The Special Master in treating this asset held that according to the testimony it would not have exceeded $90,000. (p. 286). The record shows that the testimony on which this estimate was based was that of Mr. Wolf, one of the solicitors for the appellees who testified in response to his own question and over objection and exception by the solicitor for the appellant, that *in his opinion*

> "the maximum amount that can be recovered by the plaintiffs in these two suits is between $50,000. and $90,000." (p. 274.)

The complaints (Defendant's Exhibits H and J, pp. 475-486; 492-506), show the actions to be for accountings based on pooling agreements covering 20,000 shares each (pp. 480, 498). In the first of these J. M. Fiske & Co. had a participation of 4,000 and in the second 2,000 shares. On the morning of January 19, 1910, the brokers were carrying 9,740 shares for all accounts. If the theory of counsel for the appellant as contained in his question to Mr. Wolf which he declined to answer (p. 275), that the measure of recovery in these actions would be the difference in the value of the stock before and after the break, is correct it is manifest that on their subscriptions of 6,000 shares they suffered a loss of $171,000. on the drop of 28 1/2 points.

Our contention, however, is not directed so much to the Special Master's method of computation as to his right on the record to compute the value of this claim as he did. If Mr. Wolf's opinion is competent evidence, we have shown that his method of computation is wrong. If his testimony, as to its value is incompetent, then the record shows the existence of an asset in the hands of the appellees, whose value is not shown and which may or may not serve to make the bankrupts solvent. This being the state of the record, the proof of insolvency required by the statute must necessarily be held to be insufficient.

We do not claim that the figures given by Mr. Morse are incorrect in any particular. We do assert, however, that his testimony that the liabilities exceeded the assets is based entirely upon what the books of the firm showed and that he took an arbitrary hour (viz., 12 o'clock noon), which bears no relation to the facts of the case at bar, took market values existing at that moment, which must be admitted to have been the result of wanton ma-

nipulation and assumed an instantaneous and complete liquidation (p. 46).

If Mr. Morse's figures establish insolvency as defined in and called for by the statute, then a sudden and temporary depreciation in the market quotation of a stock such as took place during the celebrated Northern Pacific corner would also satisfy the requirements of the statute. Insolvent for 60 seconds and solvent for the rest of the business day could become a prevalent situation. The creditor who happened to receive any securities during the 60-second period would be required to give them up, while the creditor who received securities immediately preceding or subsequent to the 60-second interval could retain them.

Such a construction is so violative of the fundamental reason for the enactment of the Bankruptcy Act, viz., equality for all creditors of the same class, that no court should adopt it.

The appellees here sought to establish one of the elements necessary to predicate a statutory right. This cannot be done by deduction. There is no proof whatsoever that the *value* of Hocking actually depreciated in accordance with the fluctuations of the stock market on that day. To draw such a deduction from the record cannot be supported upon the showing made. It is inconceivable that the "fair valuation" of the stock followed the market vagaries of January 19, 1910.

Furthermore, the law recognizes the possibility of such an occurrence as is shown at bar, and declines to recognize it as a fair criterion in determining the "fair valuation" required by the statute.

> "So the market value of the shares of capital stock may sometimes be above and sometimes below the actual value. Such value may be greatly enhanced or depressed for speculative purposes without any change

in the actual value. But the market value of any stock which is listed at the Stock Exchange in New York, and largely dealt in from day to day for a series of months will usually furnish the best measure of valuation for all purposes. The competition of sellers and buyers, most of them careful and vigilant to take account of everything affecting value of stock in which they deal, and each mindful of his own interests, and seeking for some personal gain and advantage, will almost universally, if time sufficient be taken, furnish the true measure of the actual value of stock. * * * That standard is sometimes illusionary and untrustworthy."

Per EARL, *J.*, in

People ex. rel. The Knickerbocker Fire Insurance Co. v. *Coleman*, 107 N. Y., 541, 544.

"Fair valuation is not what the property would bring at a forced sale. The valuation used as a test must relate to the conditions existing in respect to the bankrupt's business as a going concern, at the time when the preference was given."

Collier on Bankruptcy (9th Ed.), p. 792.

Rutland County National Bank v. *Graves*, 156 Fed., 168.

J. W. Butler Paper Co. v. *Goembel*, 143 Fed., 295.

Chicago Motor Vehicle Co. v. *American Oak Leather Co.*, 141 Fed., 518.

Chicago Title and Trust Co. v. *John A. Roebling's Sons & Co.*, 107 Fed., 71.

It is indisputably the law that a reasonable period of time must be taken in ascertaining the value of securities.

Gallagher v. *Jones*, 129 U. S., 193.
In re Swift, 114 Fed., 947.

Wright v. *Bk. of Metropolis*, 110 N. Y., 237.
Gruman v. *Smith*, 81 N. Y., 25.
Baker v. *Drake*, 53 N. Y., 211; 66 N. Y., 518.

Furthermore the bankrupt firm being a partnership it must also be shown that each of the partners was also individually insolvent.

Francis v. *McNeal*, 186 Fed., 481, 484, and cases cited.
Tumlin v. *Bryan*, 165 Fed., 166.

The partnership was composed of Josiah M. Fiske, Dudley P. Humphrey, Clifford M. Washburn and Arthur C. Sherwood (p. 31). In support of their financial status *on January 19, 1910*, the schedules in bankruptcy of Arthur C. Sherwood and Josiah M. Fiske are in evidence (Plaintiff's Exhibit 30, p. 428 *et seq.*; Defendant's Exhibit A, p. 455 *et seq.*; Defendant's Exhibit A, p. 467). Mr. Sherwood testified that his liabilities on January 19, 1910, were $12,533.91 and that his schedules in bankruptcy showed all his individual assets (p. 212) and Mr. Fiske testified that his assets on January 19, 1910, were as shown in the Schedules (p. 181). Mr. Humphrey was called as a witness and after examining certain schedules which were shown him but not introduced in evidence, testified that his liabilities were $440.41 *and his assets not over $1,000* (p. 216). It was stipulated that if Mr. Washburn were called he would testify that his individual assets and liabilities on January 19, 1910, consisted of $276.20 assets and $96,438.91 liabilities (p. 267).

This proof does not properly establish the insolvency of all the parties on January 19, 1910. Mr. Humphrey by his own testimony is solvent and the schedules in bankruptcy of Messrs. Fiske and Sherwood, even supported to a certain extent by

their own testimony are not sufficient proof of their financial condition on January 19, 1910.

Tumlin v. *Bryan, supra.*

(*b*) THE PAYMENT MUST HAVE BEEN IN SATISFACTION OF OR ON ACCOUNT OF AN ANTECEDENT DEBT.

It was held in *Coder* vs. *Arts*, 152 Fed., 943 (affirmed in this Court, 213 U. S., 223) by Circuit Judge Sanborn writing the opinion of the Circuit Court of Appeals for the Eighth Circuit that

> "An insolvent debtor until the commencement of proceedings in bankruptcy still has the jus disponendi of his property. He has the right to secure and pay his debts with it, and he has the right to secure one creditor in preference to others, provided always the security or the payment is not violative of any of the acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under section 67e" (p. 947).

As was pointed out by Circuit Judge Ward writing the opinion of the Circuit Court of Appeals in the case at bar:

> "But it is not every transfer by an insolvent within the four months period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference" (Record, pp. 516-517).

From the beginning of this litigation the transactions between banks and brokers such as that

under discussion have uniformly been considered as continuous, beginning at or about the opening of business and continuing until 3 o'clock in the afternoon (Special Master's Report, pp. 298-302). As was said by the learned Circuit Judge:

> "The loan and repayment the same day should be regarded as one transaction, the fact that they were not literally contemporaneous being a necessary result of the nature of the business" (p. 517).

The question in this case then is not whether or not the delivery of the securities was in payment of the credit given in the morning, but whether when the appellant gave the credit of $100,000 they contracted to have security therefor and whether the delivery of the securities sought to be set aside was in pursuance thereof.

If the giving of the credit was one transaction and carried with it no understanding as to security, the subsequent receipt of the security as another transaction was undoubtedly an effort to pay an antecedent debt and should come under the ban of the statute.

(*c*) PAYMENT WITHIN FOUR MONTHS OF THE FILING OF THE PETITION MUST BE ESTABLISHED.

There is no question but that the transfer took place within the time limited by the statute. The whole transaction occurred on the morning of January 19, 1910, and an involuntary petition in bankruptcy was filed against J. M. Fiske & Co., at 3:25 P. M. on that day. (Plaintiff's Exhibit 10, pp. 138, 394-398.)

The mere fact that the transfer was made within four months of bankruptcy may of itself be sufficient to constitute it a preference, but it is not, in the absence of the other statutory requirements sufficient to constitute it a *voidable* preference.

(*d*) INSOLVENCY MUST HAVE EXISTED AT THE TIME WHEN THE PAYMENT WAS MADE.

The appellees to sustain their right to recover must be shown to have made out as a part of their case the existence of insolvency *as defined by the statute* "at the moment the preference is obtained."

Tumlin v. *Bryan,* 165 Fed., 166, at 168.

Rutland County National Bank v. *Graves,* 156 Fed., 168.

J. W. Butler Paper Co. v *Goembel,* 143 Fed., 295.

In re Rome Planing Co., 96 Fed., 812.

> "It is essential to a preference that the debtor should have been insolvent at the time, *and unless this appears there is no act of bankruptcy.*" [Italics ours.]

Per ARCHIBALD, *D. J.,* in

Troy Wagon Works v. *Vasthinder,* 130 Fed., 232, 234.

The inhibition of the statute applies only to preferences given when the debtor is insolvent in fact, and a lien perfected before such insolvency is not affected.

In re Wittenberg Veneer & Panel Co., 108 Fed., 593; affd. sub voc. *McDonald* v. *Daskam,* 116 Fed., 276.

Mr. Roe fixed his time of arrival at the office of J. M. Fiske & Co. at something more than five or ten minutes before 12 o'clock noon on January 19th, 1910. His entire stay in the office of J. M. Fiske & Co. occupied less than five minutes, and he arrived back at the bank by noon or a very few minutes thereafter (pp. 91, 96). The notice of the inability of J. M. Fiske & Co. to meet their current obligations was received at the New York

Stock Exchange at 12:40 P. M. (p. 42). The petition in bankruptcy was filed at 3.25 P. M. (p. 138). These facts are uncontradicted, and it is therefore incumbent upon the appellees to establish the fact that J. M. Fiske & Co. and the several members of said firm, were insolvent within the meaning of the Bankruptcy Act, between ten minutes before 12 o'clock M. and 12 o'clock noon on January 19th, 1910. It is apparent that this proof does not meet the requirements of the statute in this regard.

It is a well known fact that on the Stock Exchange, quotations vary enormously in a few moments, and this is especially so in "panicky" times. Such was the case in the suit at bar, and in such a case, the law will recognize the fraction of a day and the rule that the law takes no notice of the fraction of a day is inapplicable.

Upson v. *Mount Morris Bank*, 103 App. Div. (N. Y.), 367.

The adjudication of bankruptcy on March 12, 1910, did not relate back to the filing of the petition and is not evidence of insolvency prior to such filing.

Tumlin v. *Bryan*, 165 Fed., 166.
In re Chappell, 113 Fed., 545.
In re Alexander, 102 Fed., 464.
In re Rome Planing Co., 96 Fed., 812.

(*c*) THE PAYMENT MUST HAVE ENABLED THE CREDITOR RECEIVING THE SAME TO OBTAIN A GREATER PERCENTAGE OF ITS CLAIMS THAN ANY OTHER CREDITOR OF THE SAME CLASS.

The record shows that J. M. Fiske & Co. obtained no "day" or "clearance" loans from any other bank than the appellant. These transactions constituted the appellant a creditor in a class by itself. The prohibition of the statute condemns prefer-

ences only when they operate to create an inequality of payment between creditors "of the same class."

There being no other creditor of this class there could be no violation of the statute.

Swarts v. *Fourth National Bank*, 117 Fed., 1.

Crooks v. *The People's National Bank*, 46 App. Div. (N. Y.), 335.

The classification referred to in Section 60*a* is not the same as that providing for priority in the payment of debts in Section 64*b* although the Special Master would seem to so assume (p. 287).

A landlord is a creditor of a different class from other creditors under Section 60*a* but he would not be entitled to priority under Section 64.

In re Belknap, 129 Fed., 646.

In re Barrett, 6 Am. Bkpcy. Rep., 199.

The holder of a note endorsed by third persons is in a different class from other creditors, under Section 60*a*.

In re Harpke, 116 Fed., 295, 297.

Almost any distinction is sufficient to constitute a separate class under Section 60*a*.

In re Denning, 114 Fed., 219, 221.

Gomila v. *Wilcombe*, 151 Fed., 470,

but the classification under Section 64 is definite and fixed.

(*f*) THE DEBTOR MAKING SUCH PAYMENT MUST HAVE INTENDED TO GIVE SUCH A PREFERENCE.

Just how far the intention of the debtor is an element in determining whether or not a preference has been given which can be set aside under the provisions of the statute has been the subject of much judicial discussion in the various Federal

Courts and has resulted in the formulation of two distinct rules.

We will not attempt to collate all the cases touching upon the subject. It will be sufficient to take a representative case of each class.

In *Alexander* v. *Redmond*, 180 Fed., 92 (C. C. A., 2nd Circuit, p. 95), Circuit Judge LACOMBE, writing the opinion of the Court, held the rule to be (p. 95) that

> "The result of the transfer and not the mental attitude of the transferor, is made the test."

While in *Hardy* v. *Gray*, 144 Fed., 922 (C. C. A., 1st Circuit), Circuit Judge PUTNAM, after a very thorough examination of the authorities, concluded that the statute

> "involves the element that the 'creditor had reason to believe a preference was intended', which could not exist unless, in fact, a preference was actually intended on the part of the debtor, or unless there existed what the law regards as the equivalent thereof" (p. 927).

This latter rule is approved and followed *In re First National Bank of Louisville* (C. C. A., 6th Circuit), 155 Fed., 100, in which case Mr. Justice LURTON, then a Judge of the Circuit Court, concurred in the opinion of Circuit Judge SEVERENS, in which it was held, following the authority of *Hardy* vs. *Gray*, *supra*,

> "That the reasonable implication of the language is that the debtor himself must have intended the preference. The very word signifies the doing of a thing with a purpose to give an advantage; and the construction which treats the motive of the debtor as indifferent seems artificial and awkward" (pp. 103-104).

These latter cases are followed and approved in the same Circuit in *Kimmerle* v. *Farr*, 189 Fed., 295; and in *In re Leech*, 171 Fed., 622; in the Circuit Court of Appeals for the Fifth Circuit, in *Tumlin* v. *Bryan*, 165 Fed., 166; and in the District Court of the United States for the Eastern District of Kentucky in *Debus* v. *Yates*, 193 Fed., 127, in which District Judge COCHRAN made a very exhaustive examination and review of the authorities.

This case coming as it does from the 2nd Circuit was expressly decided on the basis of *Alexander* v. *Redmond*.

Our examination of the authorities has led us to the conclusion that the respective merits of these two rules of interpretation have never been brought squarely before this Court, and we respectfully submit that the rule as now existing in the Second Circuit is erroneous, is not in accord with the best authorities upon the subject, is judicial legislation in that it dispenses with one of the requirements of the Act, and is not based on a sound rule of construction of the Bankruptcy Act.

It has been said that the doctrine announced in *Alexander* v. *Redmond* had been theretofore approved by this Court in *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S., 438, and it might also appear from its decision in *Benedict* v. *Deshel*, 177 N. Y., 1, in which the question was squarely put and answered in the negative as to whether in a suit by a trustee to avoid a preference it was incumbent upon him to prove *the intent of the debtor* to give a preference, as well as the creditor's reasonable ground to believe that a preference was intended to be given, that the New York Court of Appeals was of the opinion that this Court had lent its approval to said doctrine.

In spite of this high authority, we are unable to agree with the New York Court of Appeals in its

interpretation of the decision in the *Piric* case, and agree with District Judge COCHRAN who, writing the opinion in *Debus* v. *Yates* (*supra*), pointed out that in rendering that opinion the State Court entirely overlooked the fact, that in the *Piric* case this court was dealing with an *obstructive* preference, and that in the case of a *voidable* preference the intent of the debtor was an element necessary to be established (193 Fed., 436).

The question in the *Piric* case was whether under Section 57*g*, a person who had received a preference of *any nature*, had to surrender it in order to prove a claim in bankruptcy. The case, however, in no way involved the question of the necessary elements which must be proved to establish the trustee's right to avoid a preference under Section 60 *b*. The difference between the requirements of the two sections is plainly recognized by Mr. Justice MCKENNA, who said (pp. 454-455):

> "It is further contended 'that to constitute a preference under the bankruptcy act within either 57 (*g*) or 60 (*a*), at least *the intent on the part of the bankrupt to prefer must be* present.' In support of this, it is said, that an act of bankruptcy consists under Section 3 (2) of a transfer by a debtor while insolvent of any portion of his property to one or more of his creditors, *with intent to* prefer such creditors over other creditors, and in such a case a petition in involuntary insolvency may be filed against him. Section 3*b*. It is hence deduced, reading those provisions with Section 60 (*a*), that preferences under the latter must be taken with the intent declared in the former, because it is not reasonable to assume that Congress intended that there could be preferences which were not acts of bankruptcy. The claim overlooks the fact that the language of Section 3 (2) implies a difference between a preference and the intent with which it is given, and besides confounds the

> different purposes of the sections and their different conditions. It was for Congress to decide whether the consequences to a debtor of being forced into bankruptcy so far transcended the consequences to a creditor by a surrender of his preference, as to make the power depend upon an intent to offend the provision of the statutes and the latter not so depend. And we see nothing unreasonable in the distinction or purpose."

All that is then decided, is that if a person who has received a preference wishes to participate further in the division of the bankrupt's estate, he must surrender the preference irrespective of whether or not he received it under conditions which would warrant a recovery by a trustee in bankruptcy.

In *In re Fixen* (C. C. A., 9th Circuit), 102 Fed., 295, approved by this Court in the *Pirie* case, Circuit Judge MORROW shows that such an interpretation would in no way interfere with ordinary transactions based on credit, and says:

> "The creditor is not compelled to surrender a payment made to him on account, in the ordinary course of business, unless he has reason to believe that his debtor is insolvent and that the payment is a preference. If the creditor is innocent in the transaction, *he has his option* to retain the payment and waive his claim to the balance of the account, or he may surrender the payment and present his claim for the whole account" (p. 299). [Italics ours.]

Referring to the *Pirie* case, District Judge LOWELL writing in the District Court of the District of Massachusetts in *In re Henry C. King Co.*, 113 Fed., 110, states:

> "That case held that the transaction was none the less a preference because the ele-

> ment of knowledge was wanting, and, if this be so, a transaction can hardly be more a preference because knowledge of insolvency is present; in other words knowledge of insolvency converts an innocent preference which may be obtained if the creditor will forego proof, into a guilty preference which may be recovered back by the trustee. But, since the element of knowledge is excluded from the definition of preference—it follows that even an innocent preference, one received without knowledge of insolvency—is still a preference, and must be surrendered *before proof*" (p. 111). [Italics ours.]

Circuit Judge PUTNAM in *In re Dickson* (*Dickson* v. *Weyman*), (C. C. A., 1st Circuit), 111 Fed., 726, declines to apply the rule of the *Pirie* case to a case where a creditor in the ordinary course of business, during the four months preceding bankruptcy received payments and gave credits on open account without any intention to acquire an unjust preference, even though the result of the transactions was to increase the net indebtedness to the creditor, and correspondingly decrease the bankrupt's estate.

The ruling of Judge PUTNAM in this latter case was approved by this Court in *Jacquith* v. *Allen*, 189 U. S., 78. That case came before the Court from the Circuit Court of Appeals for the First Circuit. It was decided below (118 Fed., 270), on the express authority of *In re Dickson* (*sub. voc Dickson* v. *Weyman*), no opinion being written.

See also the remarks of District Judge HAMMOND in *In re Wolf and Levy*, 122 Fed., 127, on the subject of the efforts to extend the authority of the *Pirie* case.

In fact the entire extent of the holding of the *Pirie* case has been stated by the learned Chief Justice in his opinion in *Jacquith* v. *Allen*, *supra*.

After analyzing the findings of fact he says, at page 82:

> "*Upon the facts* the Circuit Court of Appeals concluded as a matter of law that the payments made 'at the time and in the manner * * * shown', constituted a preference, and that by reason of the failure and refusal of Carson, Pirie and Company to surrender the preference *they were not entitled to prove their claim*" [Italics ours].

Reverting to the case of *Alexander* v. *Redmond* (*supra*) an examination of the facts will show that the same result could have been reached by applying the doctrine of *Hardy* v. *Gray* without establishing the radical rule laid down in the opinion of the learned Circuit Judge.

The facts were as follows:

Redmond & Co. for a period of two years had discounted the bankrupts (Borrn & Co.) paper. On August 12th, 1908, they bought from it a draft on London for £500 which was not accepted by the drawer when presented. Upon demanding repayment on August 29, 1908, of the amount paid on the discount, a representative of the bankrupt stated that it was not in a condition to make such refund. A conference was arranged for September 1 and as a result of that conference a written assignment was made by the bankrupts to one Thomas, a representative of Redmond & Co. of certain enumerated book accounts standing on the books of the bankrupt. At this conference there were present besides certain officers of the bankrupt, representatives of several of its large creditors and one Schnitzer, counsel for Redmond & Co. Counsel for the bankrupt informed Schnitzer on that day that Borrn & Co. were "hopelessly insolvent." The affairs of the concern were thoroughly gone over by the conferees and Schnitzer insisted on payment, saying if Redmond & Co. were not paid he would

cause Borrn & Co. to be thrown into bankruptcy. Objection was made by counsel for one of the other creditors at Redmond & Co. being preferred over his client, and Schnitzer replied that he thought they were entitled to a preference because the debt had not been long owing and Redmond & Co had made the discount under a misapprehension. After further discussion Schnitzer said: "I will take this assignment and take my chances on it, if you people will permit it to be given." Later, after the assignment had been made and counsel for the bankrupt had remarked on its probable invalidity, Schnitzer again remarked: "Well, go ahead and fix it up, and I will take my chances." Subsequently Borrn & Co. were thrown into bankruptcy and an action was brought by the trustee to set aside the assignment to Thomas as the agent of Redmond & Co. under Section 60 of the Bankruptcy Act.

We submit that these facts present a perfect case from which the Court could properly infer an intent on the part of the bankrupt to give a preference as well as a reasonable cause to believe that a preference was intended to be given on the part of the creditor.

Schnitzer, with full knowledge of the financial status of Borrn & Co. *demanded* for his clients that their debt be secured, the demand being accompanied by a threat of bankruptcy. The assignment was *given* with full knowledge of the situation and was accompanied by a statement that the same would probably be set aside if bankruptcy ensued, and was *accepted* by the creditor in the face of objection by another creditor that it constituted a preference, with the statement that they would take their chances on it.

The difficulty with the rule of the *Alexander* case is that it imposes upon the creditor the duty of determining what the effect of the transfer will be, instead of burdening him merely with the duty im-

posed by the statute which only involves deciding what the intent of the bankrupt must reasonably be supposed to be, and in so doing the case reads out of the statute one of its "reasonable implications" (*In re First National Bank of Louisville, supra*).

That this was not the law was very apparently the opinion of the Congress when it passed the Act of June 25, 1910, and amended Section 60*b*) so as to provide that

> "if, at the time of the transfer * * * the person receiving it or to be benefited thereby, or his agent acting therein, * * * shall have reasonable cause to believe that the enforcement of such * * * transfer *would effect a preference*, it shall be voidable by the trustee" (U. S. Comp. Stat. 1901, Supp. 1911, p. 1506). [Italics ours.]

Contrast this statute with the provisions prior to the amendment which specifically provided that the creditor must be shown to have reasonable cause to believe "*that it was intended to give a preference*," and it will readily be seen that the entire *modus operandi* thereunder has been changed.

The proof is now directed by the Statute to the *effect* of the transfer rather than the *motive*, and if the effect is shown and the reasonable cause of the creditor to believe that the payment would result in such an effect is shown, the statute is satisfied irrespective of the intent or motive which may have prompted the transfer.

> *Collier on Bankruptcy* (9th Ed.), p. 815.

Under the present existing statute which absolutely does away with the intent of the debtor the rule of *Alexander* v. *Redmond* that the mental attitude of the transferor is immaterial is undoubtedly correct. The difficulty with that case is that it

anticipated the amendment of 1910. If the case were sound law why should the Congress find it necessary to amend the statute? Manifestly it construes as immaterial one of the constituent prerequisites required to be proved, it is judicial legislation and in so legislating it adopts of necessity a construction which is forced and which the Circuit Court of Appeals for the First Circuit declined to adopt in *Hardy* v. *Gray* (*supra*) and it is against the weight of authority.

In the case at bar the only evidence bearing in any way upon the intent of the bankrupt is found in Mr. Roe's testimony (pp. 79-121). As pointed out by Mr. Roe he deliberately told Mr. Sherwood that he had heard rumors of his firm (pp. 92-93). And although he apparently was given every opportunity to speak, he made no direct reply to this charge involving his very right to do business (p. 93). Mr. Sherwood was called as a witness (pp. 212-214), and gave no testimony whatever on this most important phase of the transaction. The same is true of Mr. Fiske (pp. 53-71, 181-212). Mr. Sherwood's act of delivering securities to Mr. Roe, when he was under contract so to do upon demand cannot be construed as an act of silent assent. He was merely living up to his contract and knew that if he did not do so his credit, which was the most vital necessity of his business, would be instantly impaired. His consent was given only to what he could not lawfully oppose.

Wood v. *United States Fidelity and Guaranty Co.*, 143 Fed., 424.

Furthermore his silence under such circumstances cannot be construed as evidence of his intent to prefer. Such an argument was advanced

and its soundness denied by this Court in the case of a creditor whom the debtor allowed to reduce a just claim to judgment without any action on his part.

Wilson v. *City Bank*, 17 Wall. (U. S.), 473.

In re Jackson Iron Mfg. Co., Fed. Cas. No. 7153, citing

Sawyer v. *Turpin*, 91 U. S., 114.

Clark v. *Iselin*, 88 U. S., 360.

Watson v. *Taylor*, 88 U. S., 378.

Cook v. *Tullis*, 85 U. S., 322.

See also

Remington on Bankruptcy, § 1829.

(*g*) THE CREDITOR RECEIVING SUCH PAYMENT MUST HAVE KNOWLEDGE OR HAVE HAD REASONABLE CAUSE TO BELIEVE HE WAS RECEIVING A PREFERENCE.

The measure of knowledge or possession of facts sufficient to constitute a reasonable cause to believe that the existence of insolvency under these provisions of the statute has been stated in many cases.

It should be borne in mind in viewing the case at bar that the transaction took place prior to the amendment of June 25th, 1910, which changed the law so that as it now stands all transactions are examined solely from the point of view of the existence or non-existence of a reasonable cause to believe whether the transfer will *effect* a preference. As has been said by one commentator:

> "The proof is now to be directed to the effect of the transfer, rather than the intent of the debtor in making it."
>
> *Collier on Bankruptcy* (9th Ed.), p. 815.

In the case at bar the learned Special Master, after reviewing the authorities, concludes that:

> "If a preference is in fact given and the creditor knows or had reasonable cause to believe that the debtor at such time is insolvent, he will be held to have reasonable cause to believe that it was intended by the debtor to give him a preference" (pp. 287-8),

and states that his statement of the rule is based on the ruling of the Circuit Court of Appeals for the Second Circuit in *Alexander* v. *Redmond*, 180 Fed., 92.

Applying that rule he then holds that the appellant had reasonable cause to believe that a preference was intended (pp. 290-291).

The learned District Judge adopts his holding *in toto* (pp. 337, 349-350), and the same is true of the Circuit Court of Appeals (p. 516).

While our sole contention is not based on this point, for we also insist that the appellant, because of its equitable lien, had at all times the right to reduce to physical possession the cash and securities received by it, we also contend that the record does not reveal a state of facts under which the appellant can be held to have had a reasonable cause to believe that a preference was in fact intended by the brokers.

We do not understand the rule prior to the amendment of the statute to have been that if A being B's debtor, and knowing himself to be in a failing financial condition, should come to B, who was entirely ignorant of A's condition, and pay his debt, that recovery would be allowed on the ground of a preference if A subsequently, and within the statutory period fails. Yet as we view it this is practically what has been the result in the case at bar.

We do not contend that in order to satisfy the

statute that the creditor must be in possession of actual facts which will show the financial condition of the creditor. The rule unquestionably has been established that if a creditor accepts a transfer under circumstances which would lead a business man of ordinary prudence and sagacity to believe that he was being preferred by the debtor, without investigation, he will be charged with such knowledge of the debtor's intent as he would have acquired had he made such investigation, and in determining this fact each case must of necessity stand largely on its own feet.

Collett v. *Bronx Nat. Bk.*, 200 Fed., 111.
In re Klein, 197 Fed., 241.
In re The Leader, 190 Fed., 624.
In re Pfaffinger, 154 Fed., 523.
Collier on Bankruptcy (9th Ed.), pp. 816-817.

But this does not mean that mere *suspicion* of insolvency is sufficient to satisfy the statutory requirement.

As was said by Mr. Justice BRADLEY in *Grant* v. *National Bank*, 97 U. S., 80:

> "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. *To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact.* He may be unwilling to trust him further;

> he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. *Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law.* * * * The act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinary intelligent man" (pp. 81-82). [Italics ours.]

Upon the authority of this case Circuit Judge Sanborn writing the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Powell* v. *Gates City Bank*, 178 Fed., 609, states the rule as follows:

> "Suspicion, fear and facts which arouse suspicion and fear that the debtor is insolvent and intends to prefer a creditor, in the absence of notice or knowledge of facts that give such a creditor reasonable cause to believe the insolvency or the intended preference are insufficient to avoid the latter."

See also,

Stucky v. *Masonic Savings Bank*, 108 U. S., 74.
Barbour v. *Priest*, 103 U. S., 293.
Sparks v. *Marsh*, 177 Fed., 739.
First National Bk. v. *Abbott*, 165 Fed., 852.
In re Pfaffinger, 154 Fed., 523.
Off v. *Hakes*, 142 Fed., 364.
In re Eggert, 102 Fed., 735.

Furthermore, if the only real status of the bankrupts could have been obtained from their

books, a creditor who has no right of access to those books cannot be charged with knowledge of the facts which they would reveal.

In re Wolf, 164 Fed., 448; affd. *sub. voc.*

Sharpe v. *Allender* (C. C. A., 3rd Circuit), 170 Fed., 589.

There is no evidence to show that the appellant or its officers had actual knowledge of the financial status of J. M. Fiske & Co. at any time on January 19, 1910, so in order to ascertain whether it can be brought within the operation of the rule of *Grant* v. *United States* (*supra*), an examination must be made of the surrounding circumstances.

The extent of the transactions in the financial district in New York City is so great, and the manner in which they are conducted so generally known, that the Courts will take judicial notice of it.

Louisville Trust Co. v. *Louisville, Etc., Ry. Co.*, 174 U. S., 674, 683.

Hutchinson v. *Manhattan Co.*, 150 N. Y., 250, 256.

Merchant's Bank v. *Hall*, 83 N. Y., 338, 345.

Swinnerton v. *The Columbian Insurance Co.*, 37 N. Y., 174, 189.

Agawam Bank v. *Strever*, 18 N. Y., 502, 512.

There was a sharp disturbance upon the New York Stock Exchange on the morning of January 19, 1910 (p. 162). There is no fact better recognized than the extreme sensitiveness of the entire system of credit as it exists in financial circles today.

And of all the various conditions of the trade none is more fundamental than that the ability to obtain credit at all times under certain well defined

conditions is the very life of the broker's business. The inevitable result is that nothing is more jealously guarded by the brokers than that privilege. The extension of such credit, no matter how much security or personal stability is behind it, demands of the lender as a matter of normal business diligence that it be carefully watched and protected.

It is equally the result of experience that whenever any sharp disturbance occurs in the financial market it is always productive of numerous rumors, most of which are utterly without foundation, but which generally find some plausibility in the fact that it is thought that those who they concern are dealing in or in some manner interested in the security or securities affected.

Bearing these facts in mind did then Mr. Roe's conduct on January 19th, 1910, indicate anything more than a normal business desire to protect the appellant's interests as they were entitled to be protected?

The learned Special Master found that Mr. Roe, when he received the securities, had reasonable cause to believe that the firm of J. M. Fiske & Co. were insolvent, and while Mr. Roe did not testify as to the details of the information he received from the clerk in the bank it is apparent from what he did, that upon receiving that information he believed that the firm was unable to pay its debts; that that is the only reasonable explanation of the cancelling of the "day" loan, his instructions to the clerks not to pay or certify any more cheques and the closing and balancing of the account; that the information which he received was sufficient to have led an ordinary business man to make an inquiry into the firm's financial condition and that the hurried manner in which he acted indicated clearly that he feared the firm would be unable to pay the

bank its "day" loan before three o'clock when it would have been due (pp. 290-1).

When all the surrounding circumstances are taken into consideration, and it is recalled that all Mr. Roe did was based solely on rumor, that it was a period of excitement, that under the bank's contract, as we view it, he had a right to reduce the securities to possession, and that manifestly if it had a right to their possession it was a proper time from a business point of view to have them in possession, we submit that no reasonable, well grounded cause to believe insolvency existed in the minds of the bank officers is shown. All that is shown is that Mr. Roe heard these rumors and took steps to put his bank in the best possible position if anything untoward should happen.

All Mr. Roe did was to do what he was entitled to at any moment in accordance with the contract under which the advance of credit was made, and it was entirely in accordance with the understanding and custom of the business that the "day" loans should be taken care of before the close of business hours.

The appellant was merely insisting upon the immediate performance of the contract under which the "day" loan was made. The fact that it may have been prompted to insist upon its rights because of the development of an excited condition in the financial district, its knowledge of which was based solely on irresponsible rumors, can in no way fasten upon it the knowledge requisite to satisfy the statute.

To hold that because caution prompted Mr. Roe to act on these rumors, that the appellant had a reasonable cause to believe that the insolvency of J. M. Fiske & Co. existed *as a fact* would result in establishing the gossip of the street as a basis of fixing legal rights.

The law requires a more substantial basis than this.

As said by Mr. Justice Bradley:

> "To make mere suspicion a ground of nullity * * * would render the business transactions of the community altogether too insecure." (*Grant* v. *National Bank*, *supra.*)

As has been said, each case of this nature must of necessity stand on its own feet. An examination of the facts in *In re Wolf Co.*, 164 Fed., 449; affd. (C. C. A., 3d Circuit), *sub. voc; Sharpe* v. *Allender*, 170 Fed., 589, and *In re Klein* (C. C. A., 6th Circuit), 197 Fed., 241, shows instances where *facts* were in possession of creditors who had been preferred which were far more potent in producing a reasonable cause to believe that a preference was in fact intended, and yet the Courts in both instances refused to so hold.

(*b*) THE INSOLVENT'S ESTATE MUST BE DIMINISHED AS A RESULT OF THE TRANSACTION.

The object of the Bankruptcy Act is to insure the rateable distribution of the bankrupt's estate among his creditors.

> *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S., 438, 449.

Hence preferences are prohibited by the statute.

In order to constitute a preference, however, the *net result* of the transaction between the debtor and creditor must be to diminish the trust fund held for the benefit of the creditors. If the fund has either suffered no change or been augmented no preference has been given.

> "These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution

of the bankrupt's estate. It is such transactions, operating to defeat the purposes of the act, which under its terms are preference."

Per Mr. Justice Day in *N. Y. County Nat'l Bank* v. *Massey*, 192 U. S., 138, 147.

See, also,

Continental Trust Co. v. *Chicago Title Co.*, 229 U. S., 435.
Newport Bank v. *Herkimer Bank*, 225 U. S., 178.
Wild v. *Provident Trust Co.*, 214 U. S., 292.
Jaquith v. *Alden*, 189 U. S., 78.
In re Sagor, 121 Fed., 658.
Gans v. *Ellison*, 114 Fed., 734.
Dressel v. *North State Lumber Co.*, 107 Fed., 225.
Remington on Bankruptcy, § 1296.
Collier on Bankruptcy (9th Ed.), pp. 802-3.

An examination of the facts in the case of *Continental Trust Co.* v. *Chicago Title Co.* (*supra*), decided at the October, 1912, Term of this Court, is very helpful in determining whether the result in this case has been to diminish the bankrupt's estate.

In that case a petition in bankruptcy was filed against one Prince on February 15, 1905. For several years he had been a member of the Board of Trade of Chicago, buying and selling subject to its rules. Appellants' predecessor, the Federal Trust and Savings Bank, was engaged in the general banking business in Chicago, and Prince did his banking with that institution maintaining a general deposit and checking account therein.

By the rules of the Board of Trade purchasers

and sellers might require of the other party to the trade a deposit of 10% of the contract price of the property dealt with and further security as from time to time the margin might require.

Certain banks in Chicago of which the Federal Trust and Savings Bank was one were authorized to issue "margin certificates" in which they certified that the member of the Board of Trade giving the certificate had deposited a certain number of dollars as security on a contract or contracts between him and his vendor, which amount was payable on return of the certificate endorsed by both the vendor and vendee or else by the President of the Board of Trade.

Margin certificates were issued to Prince by the Federal Trust and Savings Bank at various times from September 15, 1904, to February 9, 1905. To procure these he had either drawn his check against his checking account with the Bank or else deposited with it the requisite sum of money.

Each certificate evidenced a liability of the Bank to Prince for the face amount thereof, unless because of his default on his contract it became payable to the other party.

On February 14, 1905, one of the Bank officers and Prince had a conference in regard to the latter's financial difficulties and one W. P. Anderson of W. P. Anderson & Co. was called in consultation. The concrete matter under discussion was as to the best method of closing out Prince's open trades, and Anderson agreed to act in the premises. Prince forthwith transferred all his open trades in accordance with the Rules of the Board of Trade, and Anderson agreed to carry out Prince's contracts and proceeded to do so. On February 15, 1905, Anderson & Co. substituted its own securities for Prince's trades and recovered and turned over to the Federal Trust and Savings Bank the certificates deposited by Prince. Prince

at that time was indebted to the Bank to the extent of about $37,000 and the Bank upon the return of the certificates by Anderson & Co. applied the money secured by the certificates to Prince's indebtedness with it. It was found that taking the open trades so transferred as a whole the condition of the market at the time of the transfer was such that the aggregate amount due Prince if he had settled would have been greater than the aggregate amount due from Prince, that the market was constantly changing on February 15th, 1905, and that if Prince had carried out all his contracts his profits and losses would have about balanced. It was also found that the plan adopted was doubtless the best plan that could have been adopted to avoid serious loss to Prince and that if Anderson had not taken charge of Prince's trades and carried them through a serious panic might have ensued.

It was held, Mr. Justice Day writing the opinion of the Court, that while the bank had reasonable cause to believe that Prince was insolvent from and after February 10, and during the transactions through and including the 15th, that the decree setting aside the payment to the bank should be reversed because the statutory element requiring a showing of a dimunition of the bankrupt's estate was wanting.

The effect of the entire transaction was explained by the learned Justice (pp. 443-4):

> "By the arrangement made, Anderson & Company took hold of the situation, and, carrying out the deals upon which Prince was bound, cleared the certificates of any obligation to others, and they thereby became payable to Prince. What was done did not in fact diminish the estate of Prince otherwise available to the creditors in the bankruptcy administration, for the traders holding them would have had the benefit of the deposits under the terms of the certificates

> and the rules of the Board of Trade. It therefore appears that this essential element of a preferential transfer within the meaning of the Bankruptcy Act, diminution of the bankrupt estate, is wanting. The fact that what was done worked to the benefit of the creditor and in a sense gave him a preference, is not enough, unless the estate of the bankrupt was thereby diminished."

In the case at bar it is established that under the method of doing business securities bought one day are deliverable the next business day and are paid for on delivery. They began business on the morning of January 19th, with a balance of $26,311.46 (p. 421). This is the amount credited on their own check book, the difference between this and the bank's balance being doubtless due to outstanding checks. The only deposit which really increased their balance that day outside the "day" loan of $100,000 amounted to $54,420.32 (credited at the bank at $54,018.08), the deposit of $73,292.75 being merely a redeposit of their own checks not delivered to the payees (p. 421).

The total aggregate of checks drawn amounted to $365,190.16 (p. 421), from which should be deducted the $73,293.75 of J. M. Fiske & Co.'s own checks drawn and redeposited. This leaves a net sum of $292,196.41 which represents the total day's business of the brokers on January 19, 1910, as shown by their own books.

If from this sum is deducted the actual balance on hand at the beginning of business amounting to $26,311.46 it will be seen that $265,884.95 of the brokers' business must have of necessity been consummated on that day with the proceeds of the "day" loan. We have not considered the deposit of $54,420.38 shown by the check book because the evidence shows that it was not received until after the account had ceased to be active.

Appendix A, hereto attached, shows that with

the exception of 20 shares of Interboro Metropolitan stock all the securities received by the appellant from the brokers were obtained either through the payment of loans, the payment to brokers for securities which they had contracted to pay for on delivery or through the substitution in loans of securities so acquired.

If we look at the situation at the opening of business before the "day" loan was made we find the broker's estate intact and him under obligation to fulfil certain contracts. To fulfil these contracts he made his "day" loan, and as a result of the transactions made with that advance of credit he was entitled to such profits, and responsible for such losses as might accrue to him, but that is a long way from the fact that he was also entitled to treat as his own property the "day" loan which was the vehicle around which these transactions were woven and which made their consummation possible.

If we examine it from another point of view the credit given for the particular purpose of allowing them to do business, increased the amount of the bankrupt's available assets by releasing to them the margin contained in the collateral loans which they paid off. Had the credit not been given, these securities would have been retained by those holding them as collateral, and would have doubtless been sold at a sacrifice. As it was, the broker was put in a position to hold the securities for a considerable time, and they were absolutely under the control and discretion of the firm or those administering it for the benefit of its creditors. The fund was thus used for the benefit of creditors generally and not to their prejudice.

FIFTH POINT.—Appellees as Trustees in Bankruptcy acquired no greater rights than had J. M. Fiske & Co.

Under the provisions of the Bankruptcy Act as it existed in January, 1910, it was well settled that a trustee in bankruptcy did not stand in the position of a *bona fide* purchaser for value. He only took such title as the bankrupt had.

Zartman v. *First Nat'l Bank of Waterloo*, 216 U. S., 134, 138.
Hurley v. *Atchison, etc., Ry. Co.*, 213 U. S., 126.
Thomas v. *Taggard*, 209 U. S., 385.
Richardson v. *Shaw*, 209 U. S., 365.
Security Warehousing Co. v. *Hand*, 206 U. S., 415.
York Mfg. Co. v. *Cassell*, 201 U. S., 344.
Thompson v. *Fairbanks*, 196 U. S., 516.

SIXTH POINT.—The books of J. M. Fiske & Co. were not properly proven so as to entitle them to be introduced in evidence to show the financial status of that firm.

The appellees attempted to prove the assets and liabilities of the bankrupt firm by offering in evidence their books, and permitting an expert accountant to testify as to what said books showed said assets and liabilities to be.

The method of proof was as follows:

Mr. Humphrey, the member of the firm who had charge and supervision of the books and also acted as Cashier was called and testified that the books were correctly kept, the entries being made in them from day to day as the transactions occurred (pp. 32-33). He was not asked to identify either the books or his own handwriting, even though he testified that he himself kept certain of them (p. 36).

Mr. Fiske another member of the firm testified that he occasionally made entries in the books, usually when work was heavy and that so far as he knew they were correctly kept (pp. 68-70).

This witness was not asked to identify either his own books or entries.

Mr. Isaacs, who had been a bookkeeper for J. M. Fiske & Co. for some years and kept some of the books (pp. 76-77) identified the Stocks Loaned and Borrowed book (p. 138), Customers Ledgers A - K and L - Z, the Purchase and Sales Book (p. 139) and Filing Blotter (pp. 139-140).

These books and several others not identified by any other witness were then exhibited to Mr. Morse, the expert accountant, who testified, over objection that the same had not been legally or properly proved, that the books exhibited to him were the books of J. M. Fiske & Co. which he had examined and from which he had compiled his statement of assets and liabilities (pp. 43-46-49, 176).

The Special Master overruled the objection to the offer of the books and allowed an exception (p. 176). He was sustained by the District Judge (p. 348). Error was duly assigned to this ruling to the Circuit Court of Appeals (p. 362) and the matter is brought before this Court on the 7th and 8th Assignment of Error (p. 523).

The books so offered and received in evidence in this manner were the following:

Private Ledger, Plaintiffs' Exhibit 18.
Customers' Ledger A to K, Plaintiffs' Exhibit 19.
Customers' Ledger L to Z, Plaintiffs' Exhibit 20.
Commodity Ledger, Plaintiffs' Exhibit 21.
Purchase and Sales Book, Plaintiffs' Exhibit 22.
Blotters, covering period Jan. 3-19, 1910, Plaintiffs' Exhibit 23.
Stock Record, Plaintiffs' Exhibit 24.
Borrowed and Loan Book, Plaintiffs' Exhibit 25.
4 Check books, Mechanics National Bank.
Predecessor of Appellant, Plaintiffs' Exhibits 26, 27, 28 and 29.

Mr. Morse distinctly stated that the only testimony he could give as to the assets and liabilities was derived from the books (p. 46).

The only witnesses who testified that they made any entries in any of the books were Messrs. Humphrey, Fiske and Isaacs.

It also appears from the testimony of Mr. Isaacs that entries were made in the books by the following persons, none of whom were called as witnesses: Messrs. Waller, Lilienthal, Cogswell, Kirschner, Endicott Fiske, Sadler and Childs (pp. 77, 138-143). Mr. Sherwood was called and his testimony is utterly barren of any inquiry in regard to the entries made by him.

None of these gentlemen were called as witnesses and no reason is given for the appellee's failure to do so.

The books were offered for the purpose of estab-

lishing bankruptcy. The only testimony as to the assets and liabilities of the firm was given by Mr. Morse, the expert accountant, whose testimony was based entirely upon what the books showed.

Although Messrs. Fiske, Sherwood and Humphrey were each called to establish their own financial condition and a stipulation as to Mr. Washburn's assets and liabilities was asked and given (pp. 181 *et seq.*; 2123; 215-6; 261) it is noteworthy that no member of the firm was asked to testify to the firm's assets and liabilities. Such evidence would have been entirely competent, and at one time or another every member of the bankrupt firm was on the witness stand.

If the appellees as trustees in bankruptcy stand in the shoes of their bankrupts then the bankrupt's books are in effect their books, and their offer by them to establish the statutory requirement of insolvency as a fact is manifestly improper because self-serving.

If, on the other hand, the trustees in bankruptcy are to be looked on as being in a position similar to the complainant in a judgment creditors action, the admission of the books is unquestionably proper, but not for the purpose of proving the existence or nonexistence of a state of insolvency. Such actions sound in fraud and the books are admitted to show the *intent* which is the basis of the fraud.

In cases in which fraud is the gravamen of the action, the courts, prompted by the inherent difficulty of proving fraud, have given a much broader interpretation to the rules of evidence than in cases where the element of fraud is not present. The reason for this policy is apparent and was very clearly explained by Judge Vann in writing the opinion of the New York Court of Appeals in *White v. Benjamin*, 150 N. Y., 258, 265-7.

> "Fraud is one of the broadest issues known to the law, for it can seldom be proved by

direct evidence, but is dependent upon circumstances which, separately considered, may be quite immaterial, but when combined are not only material but have great persuasive force. The facts in an issue of commercial fraud are frequently drawn with difficulty from hostile witnesses, whose effort is to conceal as much and reveal as little of the truth as their conscience and skill will permit. * * * Upon the trial of an issue, such as that now under review [judgment creditors action to set aside as void a general assignment for the benefit of creditors], much latitude has been allowed in modern times, not only as to the method of examination, but also as to the substance of the evidence itself. * * * In determining whether a given transaction was fraudulent, courts carefully look at the ordinary transactions of the person charged with fraud, and especially at such entries upon his books, bearing upon the subject in hand, as were made at a time when he could have had no object in manufacturing evidence. Accurate bookkeeping should present a complete history of a man's business affairs, and the entries made in the ordinary course of his business are regarded as acts and not as mere declarations. While they are not received in an ordinary action at law to recover a debt, except under peculiar circumstances, or as against the party who kept the books, in an action in equity, and especially upon the trial of what are known as 'creditors actions,' they are admitted not only against the judgment debtor, whose acts they are supposed to record, but also against those deriving title to property from him, as to such entries as were made while such property was still in his possession. * * * Although the books are not competent as against a creditor seeking to recover a judgment for his debt, they may be introduced by a judgment creditor to support an attack in equity upon the transfer of property by the judgment debtor to a third person,

> claiming a valid debt as the consideration for the transfer. Entries made in the ordinary course of business, while the debt in dispute was in process of contraction, are competent as to another creditor, for the purpose of showing that there was no such debt, or that it was materially less than the amount claimed. While such evidence is not conclusive, *it has a bearing upon the question of the intent and good faith of the judgment debtor*, as it shows how he acted or failed to act with reference to a principal fact. If the transfer attacked is defended as a preference given in consideration of a precedent debt, and it appears that the debtor in the common course of business did not regard or treat the alleged debt as genuine, it bears upon his honesty in making the transfer. Any evidence tending to establish that fact would be competent, not only as against himself, but also as against those standing in his shoes, for the motives of both parties to the acts effecting the preference are open to inquiry. Unless both acted in good faith, the preference, under ordinary circumstances, cannot stand. The good faith of the debtor, therefore, is an important element in the title of the person accepting the preference." [Italics ours.]

If this theory of the purpose of the extension of the rule is correct it is manifest that the learned District Judge was in error. In fact the case of *Adams* v. *Bowerman*, 109 N. Y., 23, cited by him in support of his ruling shows clearly that the books in that case were admitted solely as bearing on the question of the *bona fides* of the transaction and not on the issue of solvency.

The action was against a sheriff for unlawful taking. The sheriff justified under process against a firm from whom plaintiffs acquired title, alleging that that firm had acquired title by purchase on credit induced by false representations of financial standing. The Referee excluded the books of the

plaintiff's predecessor in title upon the ground that they were hearsay. The issue was as to the knowledge or lack of knowledge of the firm in question as to the fraud and the Court held the exclusion of the books to be in error because they were admissible upon whether the firm *knew of the fraud.* As was said by Judge Danforth:

> "As between them and the vendors, the sale, if obtained *by fraud* was invalid, and *bearing upon that question,* the evidence was clearly competent and material" (p. 31). [Italics ours.]

If the books are to be considered as being offered to prove bankruptcy we can find nothing in the law which relaxes the ordinary rules governing the proof of books. As we have pointed out there is no question of actual fraud in this case, and while the books may in a measure be some evidence of the intent of the debtor, the proof of which is required by the statute, to claim that the books are not introduced to show the existence or nonexistence of assets and liabilities and to show what transactions the firm was to receive the benefits of and be liable upon is futile, because without them the proof of bankruptcy is palpably inadequate.

We can see no reason in principle for differentiating the requirements of the rules of evidence in this case from the cases where services, delivery or payment are sought to be proved by book entries, and submit that none exists.

The "shop-book" rule is of great antiquity. It was originally laid down in New York State in *Vosburgh* v. *Thayer,* 12 Johns, 461, in which it is stated that

> "They [tradesmens' books] ought not to be admitted when there are several charges, unless a foundation is first laid for their admission, by proving that the party had no clerk, that some of the articles charged have

> been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him" (p. 462).

The rule has been followed in many cases, among them

> *Swan* v. *Warner*, 197 N. Y., 190.
> *Smith* v. *Smith*, 163 N. Y., 168.
> *McGoldrick* v. *Traphagen*, 88 N. Y., 334.

Rathbone v. *Hatch*, 80 App. Div., 115 in which it is applied to stock brokers' books and the requirement of the rule that it must be proved that the brokers kept fair and honest books, by a person who has dealt and settled with them on the basis of their books, is held not to have been complied with.

Although Mr. Fiske and Mr. Humphrey testified that their (J. M. Fiske & Co's.) books were correct and although Mr. Isaacs, who it is true was their clerk but who was never shown to have dealt with them on the basis of the books, testified that the entries were correct, and although Mr. Morse testified that the books contained *bona fide* transactions which his investigations led him to believe were recorded correctly, we submit that the rule of the *Vosburgh* case has not been satisfied.

The only specific evidence to be found as to the source of the entries in the books is Mr. Isaacs' testimony. He was a bookkeeper in the employ of the bankrupts and personally kept the stock ledgers, the customers' ledgers (p. 76), the clearing house blotter and the trial balance book (p. 77). Mr. Humphrey kept the cash blotter (p. 77) and the check books (p. 36). One Harry Waller kept the long and short book (p. 77) and various other persons about the office made entries from time to time (pp. 142-144). The witness made no

original entries in the books kept by him at all (p. 142). His source of information was the blotter kept by Mr. Humphrey and such blotter entries as he made were taken from the purchase and sales book (pp. 144-145). He had no source of information as to their correctness other than as shown by his balances (p. 145).

This Court in *Chaffe & Co.* v. *United States*, 18 Wall. (U. S.), 516, held that in such a case for the entries to be admissable the rule required

> "not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court" (p. 541).

See also *Chicago Lumbering Co.* v. *Hewitt* (C. C. A., 6th Cir.), 61 Fed., 314, in which Mr. Justice Lurton, then a Circuit Judge discusses this phase of the rule.

The facts in that case show an identification of books almost exactly similar to that in the case at bar, and for the error committed in their admission the judgment was reversed and a new trial ordered.

Plaintiff in error, had a saw mill near the mouth of the Manistique river in Michigan. About two miles above the mill of the appellant, defendants in error owned a mill called the "James". There was a boom across the river above each mill. The Indian river emptied into the Manistique between the two mills. Defendants in error owned lumber lands on both the Manistique and Indian rivers above plaintiff in error's mill. Defendants in error were having their logs, which were floated down both rivers, sawed at the "James" mill. Defendants in error made an oral bargain with plaintiff in error that it would saw and pile on its dock for shipment all

logs which should escape from the "James" boom into the plaintiff in error's boom and all logs which the "James" mill could not saw and which the defendants in error should pass into their boom. Defendants in error's evidence tended to show that during the winters of 1879 to 1883 inclusive they had cut and put into the Manistique and Indian rivers, according to the scale of logs made in the woods 15,346,191 feet board measure, that the logs were driven down the rivers, that the drives were what the lumbermen called "clean" drives and that not over 1% were hung or sunk. The evidence also tended to show that the amount of lumber cut at the "James" mill during that period was 11,036,176 feet and the amount received from the plaintiff in error 2,119,000. Defendants in error claimed they were entitled to recover for an amount of lumber equal to the difference between the wood scale and the amount they received from the "James" mill and the plaintiff in error, amounting to 2,190,715 feet.

For the purpose of showing the quantity of logs put into the river above the boom of the plaintiff in error, defendants in error called one McFadden who had been a foreman at a lumber camp of the defendants in error on the Indian river in the winters of 1879-1880. He testified that the logs cut at that camp and put into the stream had been scaled by one Foley, that the duty of the witness was to see they were scaled in good order, that Foley kept a tally of his scales upon tally boards hung on a piece of wire and that every evening he and Foley would figure out together from the tally boards the quantity of logs so scaled, and enter the same in a book, that he often examined Foley's scaling three or four times a day and that the book gave the tally of the logs scaled.

The book was offered in evidence and admitted over objection on the ground it was hearsay and incompetent.

Held. Error.

"It is true that the book is one which had been kept by the witness, and the entries offered had been all made by him. But it is equally true that the data upon which those entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another. * * * The mere fact that a temporary entry is made on a slate, or by chalk scores, or, as in this case, by pencil memoranda on tally boards, for the purpose of convenience and aiding the memory until a book entry could be made at the close of the day, would not operate to deprive such subsequent entry of the character of an original entry, nor the book in which it was made of its character as an original book of accounts. * * * The original rough memoranda are not books of original entry, and need not be produced; and the fact that such memoranda had been made to aid the memory until a formal entry could be made will not make the book into which they were at once transcribed secondary evidence. * * * *The difficulty in this case lies in the fact that the book entries were made from the tally-board memoranda by a person other than the one who made the tally-board entries, and who knew nothing of the correctness of the data transcribed. That McFadden was able to testify that his additions were correct, and that he had correctly entered the sums thus ascertained, is not enough.* * * * What McFadden knew was that Foley, whose duty it was to scale the logs put in the river each day from that camp, had by his tally-board memoranda reported a given number of logs, containing, when aggregated, a given number of feet, as having been set afloat on a particular day. If McFadden had made his entries from oral statements made by persons having

knowledge of the number and contents of logs floated each day, such entries would not have been competent without calling the persons who knew the facts, and on whose authority the entries had been made. Is there any distinction in the evidential value of entries made on the oral statement of clerks or servants who know the facts and memorandum made for convenience in aiding the memory of such clerks or servants? *We can see none*" (pp. 316-317). [Italics ours.]

SEVENTH POINT.—The decrees of the United States District Court for the Southern District of New York, granting the relief prayed for in the bill of complaint and affirming said decree in accordance with the mandate of the United States Circuit Court of Appeals for the Second Circuit should be reversed.

New York, N. Y., September 22d, 1913.

Respectfully submitted,

ADRIAN H. LARKIN,
Solicitor for Appellant.

ADRIAN H. LARKIN,
LEWIS H. FREEDMAN,
LELAND B. GARRETSON,
Of Counsel.

Tabulation Showing How J. M. Fiske & Co. Secured Posse uary 19, 1910, Set Forth in Plaintiff's Exhibit 6 (p. 38 Fiske & Co. Covering Transactions of that Day (Plainti

Securities delivered Defendant, as shown by Exhibit 6.	Certificate Nos.	Mechanics' Bank Chk. Nos.	Payee of Mechanics'
20 M. Wabash 1st Rfg. 4s.....	9810 22875	59547	G. Sidenburgh
	12034 22876		
	16468 22877		
	16469 28852		
	16470 28853		
	20744 28854		
	20746 30931		
	20748 30932		
	22869 30933		
	22871 30934		
10 shs. Inter-Met. Com.....	T. 3516	.....	.....
100 shs. North American.....	38054	.....	.....
900 shs. M. K. & T. Com.....	A- 01124- 10 shs.	59541	T. L. Manson &
	B- 019273- 20 "	"	"
	B- 019040- 20 "	"	"
	B- 018760- 50 "	"	"
	025171-100 "	"	"
	028002-100 "	59539	J. L. Graham
	027663-100 "	59548	National City Ba
	026575-100 "	"	"
	025464-100 "	"	"
	026603-100 "	"	"
	026429-100 "	"	"
	026820-100 "	59547	G. Sidenburgh
100 shs. Kerr Lake Mining Co....	T- 2300	59528	Dominick & Dom
200 shs. Utah Copper.....	T- 11973-100 "	59548	National City Ba
	12038-100 "		
400 shs. Columbus & Hocking Coal & Iron Co.....	4586-100 "	59548	National City Ba
	T- 4751-100 "	59550	Lathrop Haskins
	5521-100 "	"	" "
	T- 5558-100 "	59549	" "
100 shs. Chicago Union Traction Co. (Certificate of Deposit)....	A- 1958	.....	.....
100 shs. Northern Pacific.....	C- 39882- 50 "	59548	National City Ba
	C- 40058- 50 "	"	"
400 shs. Great Northern Pfd.....	A- 796668- 50 "	59548	National City Ba
	A- 80851- 50 "	"	" "
	69460-100 "	"	" "
	67271-100 "	"	" "
	67272-100 "	"	" "
200 shs. U. S. Steel Com.....	G- 324921-100 "	59551	Mechanics Natio
	G- 324922-100 "	"	" "
100 shs. Am. Car & Foundry Co..	33869	59542	E. & C. Randolp
10 shs. Sloss-Shef. Steel & Iron Co.	B- 7244	59551	Mechanics Natio
10 shs. Chicago & Alton.....	A- 1387	59551	Mechanics Natio

NOTE 1: *100 shs. North American, Ctf. No. 38054;*
The Blotter of J. M. Fiske & Co. (Plaintiff's Exhibit 23), shows that when said firm paid to National City Bank
and Iron Co. common stock represented by certificate 4089. This stock was substituted for the above named stock

NOTE 2: *100 shs. Utah Copper, Ctf. No. 12038;*
100 shs. Chicago Union Traction Co., Ctf. of Deposit A-1958:
The Blotter of J. M. Fiske & Co. (Plaintiff's Exhibit 23), shows that when said firm paid the National City Bank
Coal and Iron Co. common stock represented by certificate 5329. This stock was substituted for 200 shs. of Central
10 shs., and B-13814 for 20 shs. in the loan which said firm had outstanding with Central Trust Co. of New York.
said firm had outstanding with the Lincoln Trust Company.

APPENDIX A.

ing How J. M. Fiske & Co. Secured Possession of the Securities Delivered to the Defendant on Jan-. Set Forth in Plaintiff's Exhibit 6 (p. 381). Compiled from the Check Book and Blotters of J. M. vering Transactions of that Day (Plaintiff's Exhibits 23 and 27).

shown	Certificate Nos.	Mechanics' Bank Chk. Nos.	Payee of Mechanics' Bank Check.	Amount of Check.	Method of acquiring securities.
.....	9810 22875 12034 22876 16468 22877 16469 28852 16470 28853 20744 28854 20746 30931 20748 30932 22869 30933 22871 30934	59547	G. Sidenburgh	$25,002.25	Payment of Collateral Loan.
.....	T. 3516	.....	.....	.....	Dep. by J. J. McGraw for Margin.
.....	38054	.....	.....	.....	From Chase Natl. Bk. Loan by Substitution (*Note 1*).
.....	A- 01124- 10 shs.	59541	T. L. Manson & Co.	$9,000.00	Stock purchased.
	B- 019273- 20 "	"	"		" "
	B- 019040- 20 "	"	"		" "
	B- 018760- 50 "	"	"		" "
	025171-100 "	"	"		" "
	028002-100 "	59539	J. L. Graham	$4,500.00	" "
	027663-100 "	59548	National City Bank	$100,022.22	Payment of Collateral Loan.
	026575-100 "	"	"	"	" " " "
	025464-100 "	"	"	"	" " " "
	026603-100 "	"	"	"	" " " "
	026429-100 "	"	"	"	" " " "
	026820-100 "	59547	G. Sidenburgh	$25,002.25	" " " "
6....	T- 2300	59528	Dominick & Dominick	$900.00	Stock purchased.
.....	T- 11973-100 "	59548	National City Bank	$100,022.22	Payment of Collateral Loan. From Lincoln Tr. Co. by Substitution. (*Note 2.*)
king	12038-100 "				
.....	4586-100 "	59548	National City Bank	$100,022.22	Payment of Collateral Loan.
	T- 4751-100 "	59550	Lathrop Haskins & Co.	$15,002.08	Stock Purchased.
	5521-100 "	"	" " " "	"	" "
	T- 5558-100 "	59549	" " " "	$8,900.00	" "
tion					
.....	A- 1958	.....	.....	.....	From Lincoln Trust Co. by substitution. (*Note 2.*)
.....	C- 39882- 50 "	59548	National City Bank	$100,022.22	Payment of Collateral Loan.
	C- 40058- 50 "	"	"	"	" " " "
.....	A- 796668- 50 "	59548	National City Bank	$100,022.22	Payment of Collateral Loan.
	A- 80851- 50 "	"	" " "	"	" " " "
	69460-100 "	"	" " "	"	" " " "
	67271-100 "	"	" " "	"	" " " "
	67272-100 "	"	" " "	"	" " " "
....	G- 324921-100 "	59551	Mechanics National Bank	$15,002.08	Payment of Collateral Loan.
	G- 324922-100 "	"	" " "	"	" " " "
Co..	33869	59542	E. & C. Randolph	6,600.00	Stock purchased.
Co.	B- 7244	59551	Mechanics National Bank	15,002.22	Payment of Collateral Loan.
....	A- 1387	59551	Mechanics National Bank	15,002.22	Payment of Collateral Loan.

. No. 38054;
e & Co. (Plaintiff's Exhibit 23), shows that when said firm paid to National City Bank loan of $100,022.22 (Check No. 59548) that bank delivered among other securities 100 shs. of Columbus and Hocking Coal represented by certificate 4089. This stock was substituted for the above named stock in the loan which said firm had outstanding with the Chase National Bank.
o. 12038;
tion Co., Ctf. of Deposit A-1958;
e & Co. (Plaintiff's Exhibit 23), shows that when said firm paid the National City Bank loan of $100,022.22 (Check No. 59548) that bank delivered, among other securities, 100 shs. of Columbus and Hocking tock represented by certificate 5829. This stock was substituted for 200 shs. of Central Leather Co. stock represented by certificates Nos. C-1005 for 100 shs., B-14236 for 50 shs., B-14471 for 20 shs., B-14459 for s. in the loan which said firm had outstanding with Central Trust Co. of New York. The 200 shs. of Central Leather Co. stock so released was then substituted for the above named stock in the loan which ith the Lincoln Trust Company.

APPENDIX B.

Tabulation showing the source of the checks constituting the deposit of $54,048.18 made by J. M. Fiske & Co. on January 19, 1910, the securities for which they received said funds and the original purchase of the securities so delivered, with the source from which J. M. Fiske & Co. procured the funds with which to purchase said securities. Compiled from the extracts of the check book and blotter of J. M. Fiske & Co. printed in the record (Plaintiffs' Exhibits 23 and 27), and from the books of J. M. Fiske & Co. in evidence but not printed.

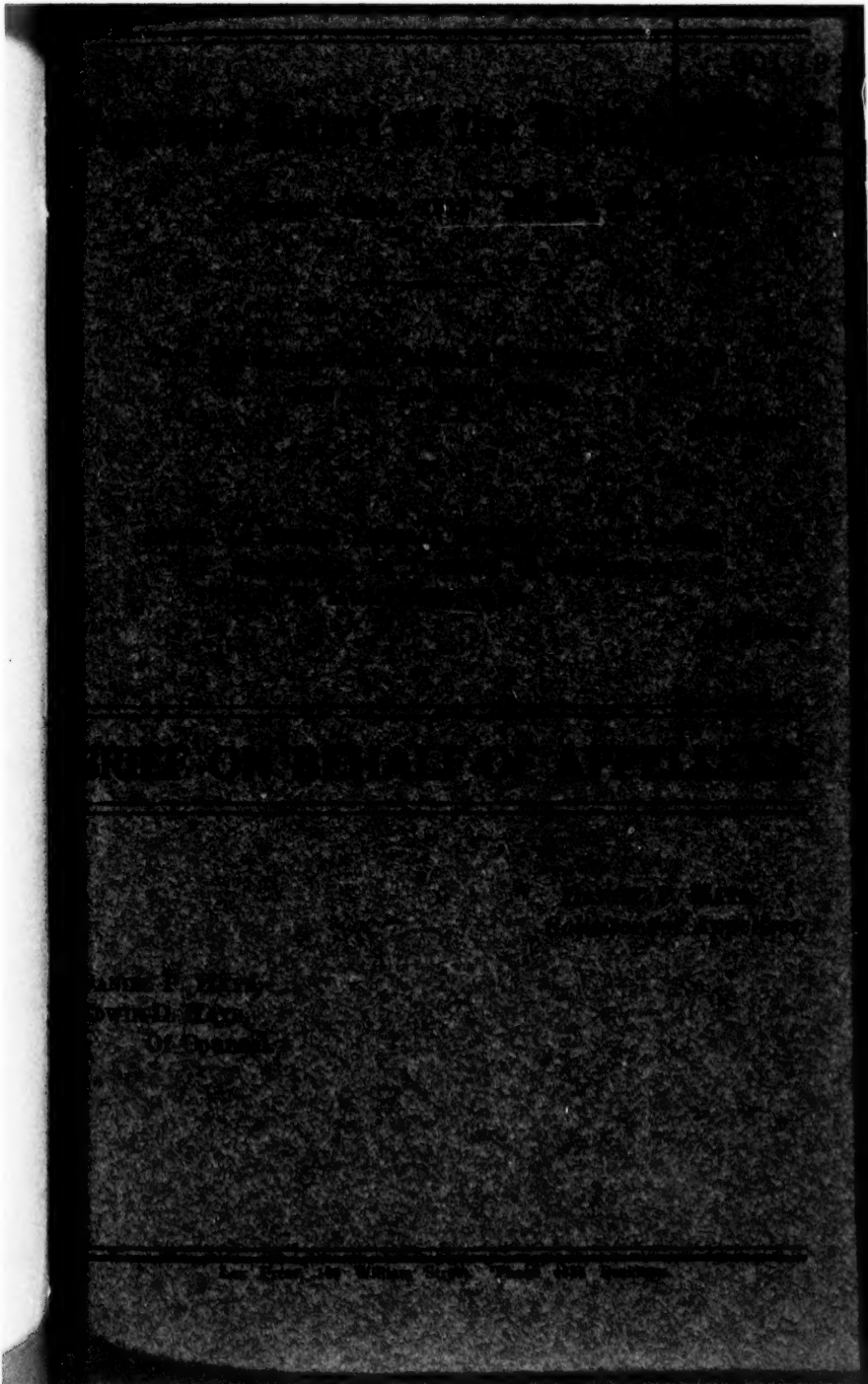
Drawer of Check Deposited Exhibit 27. P. 421.	Amount.	Securities Delivered against Check Exhibit 23 (P. 411-3).	Certificate numbers of Crtf. delivered.	Source of acquisition by J. M. Fiske & Co. of crtf. del'd.	Date of acquisition by J. M. Fiske & Co.	Mechanics' Bk. check No. Del'd on purchase.	Payee of Check.	Amount of Check.	Remarks.
S. B. Chapin & Co....	$8,400.00	100 shs. U. S. Steel @ 83-7/8.....	G-315960	Taylor Smith & Evans through Clearing House.....	Jan. 19, 1910	59534	Taylor Smith & Evans.	$8,400 00	
S. B. Chapin & Co....	6,668.75	100 shs. Pennsylvania @ 133-1/4..	Odd Lots 40 shs. A-324941; 14 shs. 321828; 20 shs. A-324881; 6 shs. A-302826; 18 shs. A-323176; 2 shs. A-831334	Strong Sturgis & Co. through Clearing House.....	Jan. 19, 1910	59535	Strong Sturgis & Co...	6,650.00	While blotter shows deliveries of "odd lots" it shows rec't of ctfs. indicated. It also shows them to be the only transaction in Penn. on Jan. 19-'10
Muller & Nash.....	975.00	210 shs. Youkon @ 4-7/8 & Com.							
	48.75	& Tax	10 shs. D- 9920 50 " D- 11620 30 " D- 10940 20 " D- 13230 100 " C-141445	From Box Jan. 19-10..					
S. B. Chapin & Co....	19,375.00	100 shs. Union Pacific @ 193-5/8..	No. 196056 Rec'd. (*(Note*) No. 176556 Del'd. (*1)*	J. J. Manning.....	Jan. 19, 1910	59545	J. J. Manning.....	19,362.50	
De Coppet & Doremus	205.00	10 shs. Boston Copper @ 20-1/2 & Com. & Tax.....	7 shs. -20013 2 " -19754 1 " -18238	From Box Jan. 19/10 De Coppet & Doremus.....	Dec. 20, 1909	58599	De Coppet & Doremus.	230.00	Mech. Bank Loan Dec. 20-09, $400,000 Bal.
C. M. Schott.....	370.00	10 shs. Tenn. Copper.....	H. 1761	From Box Jan. 19-10 C. M. Schott & Co...	Dec. 30, 1909	58847	C. M. Schott & Co.....	391.25	Mech. Bank Loan Dec. 30-09 $40,000 —Bal. $29,819.50—Payment on check stopped (*Note 2*)
Carlisle M. & Co.....	1.25	10 Missouri Pacific rights.....	$360-3801	From Box Jan. 19-10 S. W. Adler.....					
" " " "	2.50	20 " " "	$500-1598						
F. Barrell & Co.....	5,000.00	Cash			Jan. 5, 1910				
C. Fairchild Co.....	600.00	100 shs. Wheeling & Lake Erie....	6152	From Jan. 19-10 F. Grossmeyer for margin.....					
Carlisle M. & Co.....	72.13	1 sh. Missouri Pacific.....	A-44012	From Box Jan. 19-10 S. W. Adler..... ...	Jan. 5, 1910				
G. S. Kerr.....	200.00	Cash							
C. M. Schott.....	2.00	"	.....	....	.. ..	.....	.....	.....	Payment on check stopped (see note 2)
Allen McG. & Co.....	8,100.00	100 shs. Reading.....	N-10417	A. H. Coombs.....	Jan. 19, 1910	59552	A. H. Coombs..... ...	8,050.00	
Libaire & Cooke.....	4,400.00	100 shs. Central Leather.....	C-9750	S. B. Chapin & Co	Jan. 19, 1910	59533	S. B. Chapin & Co.....	4,373.00	
Total.....	$54,420.38							$47,456.75	

NOTE 1: On p. 410 of the record it appears that J. M. Fiske & Co. received from J. J. Manning 100 shares of Union Pacific represented by certificate No. 196056. On p. 411 they are shown to have delivered on the same day to S. B. Chapin & Co. 100 shares of the same stock represented by certificate No. 176556.

An examination of the books of J. M. Fiske & Co. shows that aside from the stock received from J. J. Manning they neither had nor received on January 19, 1910, any other shares of Union Pacific and delivered no other shares of that stock than those delivered to S. B. Chapin & Co.

In view of Mr. Morse's testimony (pp. 43-5) to the effect that he examined J. M. Fiske & Co.'s books, that he found that they represented general transactions and that he confirmed the transactions with the persons with whom they were had it is manifest that the certificate numbers in the blotter sheets referred to were erroneously transcribed by the clerk keeping that book.

NOTE 2: Mr. Roe, the cashier of the appellant, testified that the total of this deposit amounted to $54,048.18 (p. 80). Although the record does not explain the variation between the check book entry (*supra*), and the amount credited by the bank, the variation is capable of explanation from the bank's record, and for the sake of clarity we will account for the difference. When the deposit came in it was found that payment had been stopped on the checks of C. M. Schott aggregating $872.00. The deposit was also subject to collection charges of 20 cents, making total deductions from the deposit as originally made up of $872.20. In no event is any claim made here for a greater sum than $54,048.18.



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POINT I.—The appellant acquired no equitable lien upon the securities or moneys in question. There was no agreement or mutual intention that appellant was to have a lien upon any funds or securities not in its actual possession. No custom was proven from which such intention could be inferred. 17

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(b) The entire contract between Fiske & Co. and the appellant in regard to the loan of $400,000 on January 19th, is evidenced by the written request for a loan, together with the agreement of November 8, 1901. The appellant did not obtain a lien of any nature upon securities not in its possession..... 19

(c) Assuming that evidence, as to the alleged custom herein, was admissible, the appellant failed to prove any general custom, from which an agreement, that the bankers were to have a lien on the securities and moneys in question, could be implied..... 21

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(d) The method, in which business is transacted by the appellant and other Wall Street banks with stock brokers, is inconsistent with the existence of a bona fide understanding or mutual intention, that the bank was to have a lien on the securities, obtained with the proceeds of the loan..... 32

(e) The transactions, between the appellant and Fiske & Co. on the day of the failure, are inconsistent with the existence of an agreement, that the bank was to have a lien upon the securities, obtained by the use of its money and the proceeds thereof..... 37

(f) Custom was inadmissible to vary the written agreement between the parties. The appellant could not prove an agreement, that it should have a lien on securities in the possession of Fiske & Co., by proof of a custom to that effect. Proof is inadmissible to vary a contract or to make a different contract or to change the legal rights and liabilities of the parties as established by law..... 39

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~~money borrowed by them from the ap~~ and agreement, in this case, were that the appellant was to have a lien on the securities or the proceeds thereof, obtained by the use of the money borrowed from it such agreement was ineffective and void, because it was too vague and uncertain in character, and because of the money, in which the transactions between the bank and Fiske & Co. were had..... 44

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Supreme Court

OF THE UNITED STATES.

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Appellant,

vs.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY, *et al.*,

Appellees.

October Term, 1912.
No. 995.

BRIEF ON BEHALF OF APPELLEES.

This is an appeal from a final decree, rendered by the Circuit Court of Appeals for the Second Circuit in the above entitled cause on the 23rd day of December, 1912, affirming the final decree herein of the District Court of the United States for the Southern District of New York, made and entered on or about the 9th day of January, 1912 (p. 520). The said decree of the District Court confirmed the report of Hon. Charles F. Brown, the Special Master before whom this cause was tried (pp. 351-353).

The appellees, Trustees in Bankruptcy of J. M. Fiske & Co., brought this action to set aside the transfer of moneys and securities made by the bankrupts to the appellant, on the day the petition in bankruptcy herein was filed, upon the ground that such transfer constituted a voidable preference within the meaning of the Bankruptcy Act.

The issues raised by the pleadings.

The bill of complaint, after alleging the filing of the petition in bankruptcy against the stock brokerage firm of J. M. Fiske & Company and proceedings resulting in the election and qualification of appellees as Trustees, sets forth in substance:

That, on January 19th, 1910, appellant was an unsecured creditor of the bankrupts in the sum of about $500,000. That upon that date and for a long time prior thereto, the bankrupts were insolvent, and on that date and while insolvent transferred and delivered to appellant, as alleged payment of said indebtedness, property consisting of cash, checks, stocks and bonds, of the value of about $450,000; that on January 19th, 1910, appellant knew and had reasonable cause to believe the bankrupts were insolvent; that appellant received said transfer and delivery of moneys and securities in order to enable itself to receive a greater percentage on its alleged debt than any other creditor of the same class; and that appellant had reasonable cause to believe that it was intended thereby to give a preference (pp. 6-13).

The appellant by its answer admitted it received certain moneys and securities from Fiske & Company on January 19th, 1910, but denied all other material allegations of the bill herein in regard to the preference, and setting up its own version of the transactions of January 19th, 1910, alleged (p. 21) that "it was understood and agreed between the defendant and the said firm, at the time of the making of said advance (the loan of $400,000) at or about the opening of business on the 19th day of January, 1910, and in accordance with the terms of said agreement bearing date the 8th day of November, 1901 (pp. 23-25), and in accordance with the gen-

eral usage which had long prevailed in the transaction of such business between the defendant and the said firm, and between banks and banking institutions in the City of New York and brokers, members of the New York Stock Exchange, a usage which was well known to all persons doing business with said firm and the members thereof, including its and their existing creditors, that advances thus made should either be paid off at various times throughout the day during which said advances were made, out of the proceeds of securities which were deliverable by the borrowers on said day, or, in the event of the payment of said advances not being made in full by the close of business on said day, the remainder of said advance should be secured by the deposit by the borrower, before the close of business on the same day, of securities obtained by the said firm with the proceeds of said advance or advances."

The defendant then alleged that the checks, stocks, bonds and other securities, referred to in the bill of complaint, as having been received by it, were received pursuant to said general usage, understanding and agreement and pursuant to the agreement bearing date the 8th day of November, 1901 (pp. 14-25).

Upon the issues thus joined testimony was taken and the folowing facts appear:

Facts.

(a) *As to the loan and creation of indebtedness.*

On the morning of January 19th, 1910, there was on deposit with appellant bank to the credit of Fiske &Company the sum of $36,239.47 (p. 80), and the bank also held three promissory notes of said firm, amounting to $70,000, which were secured by collateral, deposited with said bank at the time

the loans were made, and still held by it at that time (pp. 82, 103, 104).

At about ten o'clock on the morning of the 19th, the bank received a request as follows:

> "Please loan us to-day $400,000, crediting this amount to our account, and oblige,
> J. M. Fiske & Co." (pp. 80, 379).

The bank thereupon made the loan, as requested, and credited the amount upon its books to the firm (p. 80), thus making the amount with the bank to the credit of Fiske & Company on the morning of the 19th $436,239.47.

There was no conversation between any representatives of the bank and of Fiske & Company at the time of making this loan, nor was there any contract or writing signed on that day by either party other than the direct request for the loan made by Fiske & Company and hereinabove quoted (p. 105).

It appeared, however, that the bank had a general agreement with Fiske & Company, executed on November 8th, 1901, which is the agreement referred to in the answer of the bank and set forth in full in appellant's brief at pages 3, 4, & 5.

This agreement is the ordinary printed agreement generally used by the bank in dealing with its customers, and the substance of it is as follows:

First, the bank was given a general lien upon all securities deposited with it by the firm and upon the balance of the deposit account, existing from time to time, and upon all property of the firm left with the bank for safe-keeping, or otherwise, or coming into the hands of the bank as security for any and all liabilities of the firm to the bank then existing or thereafter contracted;

Second, the bank had the right to require ap-

proved additional security, and upon the failure of the firm to deliver the same, all liabilities of the firm immediately became due.

Third, upon the failure of the firm to pay any indebtedness to the bank and to keep up its margin and collateral, the bank had the right, without advertisment and without notice, to sell the securities held by it and liquidate the liability of the firm to it (pp. 23-25).

The bank had been doing a like business with the firm for years, had daily made similar loans ~~loans~~ to the firm of four or five hundred thousand dollars (p. 81), and each of these loans had been repaid, at the close of the day on which made, by a check of Fiske & Co. (pp. 81-85). Although this was the undoubted fact, Mr. Roe, the cashier of the bank, and the chief actor in its behalf, was, at first, reluctant to admit it and endeavored to make it appear that these day loans were sometimes paid either by Fiske & Company sending in securities, making deposits or drawing their check at the end of the day (p. 81).

When asked, however, to state any occasion on which the firm had paid the loan by sending in securities, he instanced two occasions. In neither case, however, were the securities *received by the bank in payment of the loan of the morning.* In each case, Fiske & Co., having sent in such securities, obtained from the bank a new loan thereon, pledging such securities as collateral thereto and leaving them in the possession of the bank. After receiving such loans, Fiske & Co. drew a check to the bank to pay off the loan of the morning (pp. 85, 81-83).

For instance, on the morning of the 18th of January, 1910, the bank loaned the firm $500,000 on a request similar to the one above quoted (p. 82). Before the close of business on that day, the firm

sent to the bank: 200 U. S. Steel, 10 Sloss Sheffield, 10 Chicago and Alton; upon which they received a loan of $15,000 (p. 82). After this loan was credited to their account, they drew a check for $500,000 to the bank, whereupon the loan of the morning was marked "paid" on the same day (p. 82). Again, on the morning of January 7th, the bank loaned the firm $400,000 on a similar request (p. 83), and, later in the day, received from the firm: 100 Wabash, preferred, and 200 U S. Steel, and loaned it thereon $5,000 (p. 83). The unsecured loan of $400,000 was paid off on the same day by a firm check for that amount (p. 83).

Mr. Roe admitted *there was no entry on the books of the bank, showing that securities were ever received as payment of or security for any of these unsecured daily loans* (p. 84); but on every occasion of a loan of this character, the loan was paid off the same day by check.

(b) *As to the unlawful preference and receipt of securities.*

On the morning of the 19th, after the bank had loaned the $400,000 above-mentioned, Mr. Roe heard "rumors" about J. M. Fiske & Company. One of the clerks in the receiving teller's department of the bank told him about the "rumors" (p. 85). Mr. Roe knew there was a "great disturbance" in the stock market that morning (p. 86) and heard that there was some "trouble" on the Exchange and learned that it was rumored that Fiske & Compaay were in trouble (p. 86). The bank had a stock exchange ticker, but no news ticker (p. 85).

The clerk in the receiving teller's department gave Mr. Roe the impression that there was "something wrong" with Fiske & Company—that they were being "talked about." *It was something about their "financial standing"* (p. 87). The name of

this clerk was George Clark. He was, at the time of the trial, in the employ of the bank (p. 87), and was not called as a witness by it. When Mr. Roe heard the "rumor," he proceeded to close the account and gave instructions to the employees, not to make any more payments on the account of Fiske & Company. He instructed the certification department, the paying teller, and the receiving teller *not to pay any more checks nor to certify any more checks* of that firm (p. 87). He first ascertained how much the firm had drawn (p. 88). Then he went *immediately* around to Fiske & Company's office and saw Mr. Sherwood of that firm (p. 88). Before that, however, he had spoken to Mr. Knowles, the Vice-president of the bank, and had told him what he had heard, and that the firm was being "talked about" (p. 89). He had consulted with Mr. Knowles about the matter for a few minutes and had told Mr. Knowles that he would go around and see Sherwood (p. 90). The only investigation he made was to see how much Fiske & Company had drawn (p. 89). Mr. Roe was in a hurry and wanted to make time. He wanted to get the account secured just as quickly as possible (p. 90). He had never been to Fiske & Company's office before (p. 90). It was unusual for him, as cashier of the bank, to go around to customers, to whom loans had been made, endeavoring to get them to put up collateral. It was an extraordinary occurrance (p. 214). Only once before during his whole connection with the bank had such a thing occurred (p. 91). He lost no time in getting to Fiske & Company's office and reached there about twelve o'clock (p. 92). Fiske & Company were at 42 Broadway; the bank was at 33 Wall Street (p. 92). When Mr. Roe arrived at the bankrupt's office, he saw Mr. Sherwood there and told him that he had heard "rumors" about the firm; that they

had had checks certified to a considerable amount that morning and had not yet made a deposit; that he thought Mr. Sherwood had better give him some securities (pp. 92, 94). Mr. Roe did not remember the exact words used (p. 92). When Mr. Roe had stated that he had heard "rumors" that the firm was in trouble, Mr. Sherwood gave him no positive answer, but made an "evasive reply" (p. 94). Mr. Roe did not insist upon a definite answer, but on getting some securities (p. 94). Mr. Sherwood gave him securities and told him there was a deposit on the way around (p. 94). Mr. Sherwood did not tell how much the deposit was; Mr. Roe does not remember if he asked him how much it was (pp. 94, 95). Mr. Roe was there talking to Mr. Sherwood two or three minutes. The securities were obtained by a clerk or one of the partners and given to Mr. Sherwood, who handed them to Mr. Roe (p. 98). Mr. Roe just glanced over the securities and put them in his pocket, but made no list of them (p. 98).

Mr. Roe took whatever he was given and was glad to get that (p. 95, 98). His idea when he went to Fiske & Company's office was to get securities and be back at the bank as quickly as possible (p. 95). As soon as Mr. Roe got the securities, he started back (p. 95). He arrived at the bank shortly after twelve o'clock (p. 96). In his opinion it would take a little over five minutes to go from the bank to 42 Broadway, and it might have been ten minutes. He did not lose any time on the trip and was in Fiske & Company's office less than five minutes (p. 97).

When Mr. Roe came back to the bank, he found (p. 110) the deposit, spoken of by Mr. Sherwood, had arrived, and amounted to $54,048.18. As the bank had previously stopped payment of the checks of J. M. Fiske & Company and the so-called deposit of $54,048.18 was not received by the bank

as a deposit, Fiske & Company could never draw against it. It was credited to the account as a payment on account of the indebtedness (pp. 312, 313).

Mr. Roe immediately turned the securities over to the Assistant Cashier, Mr. Robinson, who was in charge of the loan deuartment, and instructed him to have a list made of them, which was immediately done (p. 99). He gave instructions to close the account and to have it balanced at once (pp. 106, 107).

Immediately after they made a list of the securities and filled in the values, the ledger account was balanced (p. 100). It took some time to make up the figures, which had to be done before the account could be balanced. It was learned that the account, irrespective of the securities, needed $242,207.57 to balance (pp. 101, 102, 105).

Before the closing of their account, Fiske & Company had three loans outstanding with the bank; one of $50,000 of November 19th, one of $5,000 of December 15th, and that of $400,000 of January 19th (p. 104). After the closing of the account, all the collateral in the hands of the bank, including the securities received by Mr. Roe, as stated, were held by the bank as security (p. 102) for the general balance of $242,201.57 (pp. 104, 103). The account was closed by entering a loan for the latter amount upon the books of the bank, and the securities were held as collateral to the loan. A bookkeeping debit entry was made of the $400,000 (p. 106). Thus, the loan of $400,000 was cancelled and together with it an entry was made of a credit of $242,201.57 (p. 106). *All of this was done without consulting Fiske & Company.* Mr. Roe testified there had been no conversation with any member of that firm, except the conversation between him and Mr. Sherwood at the time the securities were received (p. 105).

The securities which were received from Fiske & Company were subsequently sold for $175,647.45 (p. 100).

The bank also realized upon the securities held by it for the two loans amounting to $55,000, a considerable sum. It appears from the defendant's answer that the total value of the securities held by it was $239,495.

(c) *As to insolvency.*

As heretofore stated, the time at which the bank received the securities and the $54,048.18 in cash, the transfer of which is claimed herein to be a voidable preference, was *about twelve o'clock on January 19th.* It was demonstrated beyond doubt by the appellees that the firm of J. M. Fiske & Company and all its individual members were insolvent at that time. The firm suspended at 12.40 P. M. on that day (p. 96), and thereafter at 3.25 P. M. on the same day, an involuntary petition in bankruptcy was filed against them and a receiver appointed (pp. 398, 137).

The uncontradicted evidence is that on the 19th day of January, at twelve o'clock, noon, the face value of the assets of the firm was $745,919.58, and its liabilities $904,570.02 (p. 171). It is further shown that the real value of the assets was much less than that figure, inasmuch as there were included therein, among other things, so-called "accounts collectible" of the value of over $430,000, which were uncollectible.

The testimony, on which these figures are based, will be discussed in detail under Point IV hereof.

Eliminating from the assets these bad accounts, the value of the assets at twelve o'clock was not $745,919.58, but was less than $316,000. The only possible assets, which the appellant under any circumstances might claim to be not included in the

$316,000, is a claim against James R. Keene. That, according to the testimony, could not, in any event, exceed $50,000 to $90,000 (pp. 273, 274). (This claim against Keene was later settled for $41,379.33, this, the record does not show). If this $90,000 is added, for the sake of an argument, to the value of the assets, then the total value of the assets of J. M. Fiske & Company at twelve o'clcok on January 19th could not have exceeded $401,000, whereas its liabilities were $904,570.02. Not only was the firm undoubtedly and hopelessly insolvent, but each member thereof was likewise insolvent. Each member, except Clifford M. Washburn, testified to have been insolvent on January 19th, and showed his liabilities exceeded his assets.

It was stipulated as to Clifford M. Washburn that he would testify his liabilities were $96,428.91 and his assets $276.20 (p. 261).

It is further shown that at 12:40 P. M. on January 19th, J. M. Fiske & Company notified the Exchange they were unable to meet their obligations, and the firm was thereupon suspended (pp. 41, 42, 379).

Mr. Ernst, Receiver in bankruptcy of J. M. Fiske & Company, and now one of the trustees, testified what assets came into the hands of the Receiver and the Trustees. His testimony shows it to be doubtful whether these assets would realize as much as $200,000 (pp. 126, 127, 132, 157, 158, 400, 401), on the one hand. On the other hand, the amount of the claims of creditors filed with the Referee is over $1,000,000 (p. 452).

(d) *As to the defense.*

The appellant's counsel in the "Statement of the Case" contained in his brief, outlines elaborately an alleged general custom under which he contends the transactions herein involved were had.

We submit that this statement of the alleged custom is rather an exposition of appellant's claims and conclusions than of facts proven by the evidence; that it is based upon the opinions of witnesses and not upon evidence of facts; that it is contradicted by the admitted facts.

We shall not, however, argue the matter here, but shall merely outline the evidence and leave the discussion of what custom, if any, was proven for a later point in our brief.

The substance of the evidence bearing upon the defense and particularly that relating to the alleged custom, as we understand it, is as follows:

Mr. Roe, the cashier of appellant, stated on cross-examination (p. 111) that all loans to Fiske & Company were made under the agreement dated November 8, 1901, hereinbefore referred to. A copy of the agreement is annexed to the answer (pp. 23-25). Its provisions have already been set forth above.

Mr. Roe further testified that the reason he asked of Mr. Sherwood, why the deposits did not come around was, that the firm of J. M. Fiske & Company had drawn a considerable amount against the credits received in the morning and had not yet made a deposit, notwithstanding it was some time since the withdrawals had been made (p. 112); that it was customary for brokers to deposit checks to the amount of the loan as soon as the checks, which they obtained for the payment of the stocks, which they take up, were received by them (p. 113). He was then allowed to testify, over the objection of appellees, to a supposed general custom in the case of such loans. He testified: "The custom is, that the broker will send in a request for a credit, when he requires the same to clear his stocks, and the amount is credited to his account on the ledger, under the agreement which we have on file with

all the brokers. The broker then uses that credit to accept the delivery of stocks and pays for them, or to pay off a loan with another institution, and it is customary for him to send a deposit of the checks, which he receives, to the bank as fast as they are received" (p. 115).

He further testified as to the custom: "The custom is for brokers to make deposits at the bank as soon as their checks are received, that is, immediately making the deposits without delay, or securities to cover the amount of the advance made for the purpose of clearing their stocks" (p. 115). But when asked to specify the instances, where "*securities*" were delivered to the bank by the brokers, he only named the two hereinbefore referred to on pages 5 and 6 of this brief, and in both of these cases new loans were made by the bank on the securities delivered to it.

It will be noted that this is in conflict with the written agreement, offered in evidence by the bank, under which the brokers were to make further deposits of securities upon request.

Mr. Roe further testified that in the ordinary course of business such deposits of checks are sometimes made fifteen or twenty minutes after the payments are made and sometimes later (p. 116).

He further testified that the custom was "if a deposit is not forthcoming immediately, to call up the broker or send around and ask why the deposit has not been received, and to hurry them up in making the deposit" (p. 117).

He stated that the custom was for the broker in each case either to send his check to cancel the daily advance, or for the bank to charge it up after receiving a check from the broker, and that if the checks and deposits were not sufficient, the loan is cancelled and another loan is put through for the proper amount that is necessary (pp. 118-120).

Other witnesses were called by appellant to testify to an alleged custom existing in regard to these daily loans. Their versions of the custom differ in certain respects from the version testified to by Mr. Roe, appellant's cashier. The difference will be more fully pointed out. There was also a stipulation as to what other bankers and brokers would testify.

Particular attention is called to the testimony that the loan was not to be paid off by the deposit of securities with the bank, but in cash, and that the understanding was that the bank was not to be forced to make a loan on securities (pp. 222, 240, 241), that in no case was collateral deposited to secure a day loan, but that, when the broker was short of money with which to pay the day loan and could not borrow it elsewhere, in some cases new collateral loans were made, and the day loan paid in cash; that in such cases the collateral might be any good securities, however obtained by the broker (pp. 230, 268); that the loan was always credited to the general deposit account of the broker, and no separate account kept of the moneys or securities purchased with the proceeds of the loan (pp. 266, 267). Mr. Carse also testified that the understanding was that the loan was to be paid off any time during the business day. The customer had until the end of the day to pay the loan (p. 228).

Mr. Carse, Vice-President of the Hanover National Bank, said: "If the broker should overlook making his deposits during the day, the bank would call him up on the telephone, if it got along towards 2 or 3 o'clock" (p. 220).

Not all the large Wall Street banks, as appears, adopt this alleged customary method of doing business. The First National Bank, a large bank actively engaged in this business, takes from the

brokers a memorandum specifying in detail the securities which are expected to be cleared by the proceeds of the loan (p. 263).

The appellant, at page 14 of its brief, states that the finding of the Special Master, that there was no proof that the securities deposited as collateral to the two collateral loans made to J. M. Fiske & Co. by it, one of $5,000 on January 7th and the other of $15,000 on January 18th, were obtained with the proceeds of the day loans, made on said days, is incorrect, and attempts to show by certain entries in the books, that the securities deposited as collateral for said loans were obtained by the use of the proceeds of the day loans.

We consider that the manner in which these securities were obtained is of little importance, in view of the fact that according to the testimony of Mr. Roe they were not delivered to the bank to secure the day loans, but that, in each case, a separate collateral loan was made thereon.

The fact is, however, that the Master is correct in his finding.

The entries in the books do not prove the appellant's contention, ~~first, because the prove the appellant's contention~~, first, because the mere fact that the check with which the securities were purchased was a check drawn upon the Mechanics' Bank does not prove the check withdrew the proceeds of the day loan made on each of the said days, rather than other moneys so deposited to the credit of the bankrupts, and, furthermore, because it affirmatively appears that among the securities deposited as collateral to the $15,000 loan made on January 18th were ten shares of Sloss-Sheffield, which the books show, and the appellant admits, were received by Fiske & Co. for transfer on January 11th, 1910, that is to say, prior to the making of th day loan on January 18th, 1910. Clear-

ly, these securities cannot be said to have been obtained by Fiske & Co. by the use of the proceeds of the day loan made on January 18th.

The appellant, furthermore, did not make any such claim before the Master or suggest that the books would show such to be the fact, nor did it contend before him or the District Court that there was proof to this effect. Its contention, now made, is based upon entries in the books not heretofore called to the attention of counsel for the appellees until the service of its brief in the Circuit Court of Appeals.

The foregoing are the facts and the testimony, in substance, upon which the parties make their respective claims.

The appellees claim they have proven thereby without contradiction all the allegations of their complaint and that the appellants have failed to establish any defense to this action.

Facts Decided by the Master.

The Master found upon the facts in favor of the appellees (pp. 278-323). He found at the time of the transfer Fiske & Co. were insolvent, and that the bank had, at said time, had reasonable cause to believe a preference was intended (pp. 284-285).

He also found the bank had failed to prove the existence of any contract, or any custom under or by virtue of which the bank was to have a lien on the securities and funds transferred to it and that the proven fact negatived the existence of any such contract or custom (p. 297).

The Master was supported in his finding by both the District Court (pp. 337-346) and the Circuit Court of Appeals (pp. 514-519).

POINT I.

The appellant acquired no equitable lien upon the securities or moneys in question. There was no agreement or mutual intention that the appellant was to have a lien upon any funds or securities not in its actual possession. No custom was proven from which such intention could be inferred.

A.

INTRODUCTORY STATEMENT.

The appellant's defense, stated briefly, is, that it had an equitable lien or right in and to the securities transferred to it. In order to establish such a lien, it was incumbent upon the appellant to show, that, by express agreement, the mutual intention of the parties to the transaction was to create such a lien, or to prove the existence of a general custom, from which such intention could be inferred.

The definition of an equitable lien, contained in Pomeroy on Equity Jurisprudence, quoted by appellant, at pages 38 and 39 of its brief, and the other cases therein cited, all recognize, that the intention, to give a lien, is a necessary element to the existence of an equitable lien.

Our contention is, that the appellant failed to prove any facts, establishing the existence of this intention, or from which its existence could be inferred.

The general statement of facts under the title of "Day or clearance loans," under the first point of

the appellant's brief, is rather, a presentation of the claims, upon which it seeks to apply the principle of law, than a statement of the facts, as they appear in the evidence. We shall show this, in the subsequent subdivision of this point by a careful analysis of the evidence, and shall show, that, according to the evidence, the transaction between the parties on January 19th, 1910, was that of a simple unsecured loan of $400,000, made by the bank to the brokers, which was to be repaid that day in cash, and that this was the usual way, in which the day loans were made.

We shal further show, that the manner, in which business is done in the financial district in New York City, and the manner, in which the transactions, involved in this case, were had, negative the existence of any intention on the part of Fiske & Co. or the bank hereto, that it was to have an equitable lien upon the securities and moneys, subsequently transferred to it.

In connection with the discussion of these facts, it is necessary to have in mind the nature of the stock brokerage business. The entire business of a broker, from day to day, is the purchase and sale of securities and the borrowing of money thereon. He necessarily does a banking business with but one bank, where he has a general account, in which both his deposits and the moneys borrowed by him from the bank are credited. Naturally all the money, received by the broker from whatever source, is deposited by him in this general account. All withdrawals from his account with the bank, in which both his deposits and loans are thus credited, if made for business purposes, are used either to pay for securities or to pay off loans. In other words, they are for what the appellant designates, as "clearance" purposes. The entire business of the broker may well be said to involve the clearance of securities, so that a business loan, made under any

circumstances, is used for the clearance of stock. In this respect there is nothing peculiar about the day loan.

B.

THE ENTIRE CONTRACT BETWEEN FISKE & CO. AND THE APPELLANT, IN REGARD TO THE BORROWING OF $400,000 ON JANUARY 19TH, IS EVIDENCED BY THE WRITTEN REQUEST FOR A LOAN, TOGETHER WITH THE WRITTEN AGREEMENT OF NOVEMBER 8TH, 1901, AND UNDER SUCH CONTRACT, THE APPELLANT DID NOT OBTAIN A LIEN OF ANY NATURE UPON ANY SECURITIES OR MONEYS NOT IN ITS POSSESSION.

The contract made by Fiske & Co. with the bank on the morning of January 19th, when it borrowed from the bank $400,000, was simple and complete. Fiske & Co. had a written agreement with the bank, under which the parties had been doing business since 1901. A copy of this agreement is annexed to the defendant's answer and the agreement itself was offered in evidence (pp. 11, 452). The agreement provided, that Fiske & Co. should receive accommodation from the bank, and provided that the bank should have a lien on all moneys and securities *which should come into its possession* for any liability of Fiske & Co. and that it should have the right, at any time, to demand additional security upon any existing liabilities of the firm.

The bank was also empowered, in the event of any default on the part of Fiske & Co. in any of their obligations, or upon their failure in business, to sell the securities held by it at public or private sale. The agreement was to apply to all existing and future transactions between the firm of Fiske & Co. and the bank.

On the morning of January 19th, Fiske & Co. sent the following request to the bank:

"New York, January 19th, 1910.

"MERCHANTS NATIONAL BANK,
NEW YORK CITY.

Please loan us to-day four hundred thousand ($00,000) Dollars, crediting this amount to our account, and oblige

J. M. FISKE & Co." (p. 80).

The bank immediately complied wit hthe request and credited the amount of $400,000 to the account of Fiske & Co. (p. 80).

It does not appear that anything else was said or done in reference to the loan. The transaction was complete. It constituted a call loan of $400,000, subject to the terms and conditions of the written agreement.

The same practice had existed between the bank and Fiske & Co. for years prior (p. 81).

The rights of the bank in regard to security were clearly set forth in the written contract. It had a lien on all securities in its possession. Nothing was agreed to or said about any further lien, except that the agreement gave the bank the right to call for further security, but this privilege did not give it a legal or equitable lien on any securities in the possession of Fiske & Co.

It did not give it a legal lien because possession is necessary for the existence of a legal lien.

Re Faulhaber Stable Co., 170 Fed., 68.
Sexton v. *Kessler & Co.*, 172 Fed., 535.
Casey v. *Cavaroc*, 96 U. S., 467.

It did not give it an equitable lien, because a mere *agreement to give security when called* upon does not create an equitable lien, or prevent the transfer of property under such an agreement, if the transfer would otherwise be voidable, from being a voidable preference.

Re Smith, 176 Fed., 426.
Re Faulhaber Stable Co., 170 Fed., 68.
Smedley v. *Speckman*, 157 Fed., 815.
Torrance v. *Winfield National Bank*, 71 Pac., 235 (11 Am. Bk. Rep., 185).
Mathews v. *Hardt*, 79 App. Div. (N. Y.), 570.
Ryttenberg v. *Schefer*, 131 Fed., 313.

Thus, under the written agreement, the appellant had no lien ,either equitable or legal, on any property of Fiske & Co. not in its possession.

C.

ASSUMING THAT THE EVIDENCE, AS TO THE ALLEGED CUSTOM HEREIN, WAS ADMISSIBLE IN THIS CASE TO ADD TO THE WRITTEN CONTRACT, THE APPELLANT FAILED TO PROVE ANY GENERAL CUSTOM, FROM WHICH, AN AGREEMENT, THAT THE BANKERS WERE TO HAVE A LIEN ON THE SECURITIES AND MONEYS TRANSFERRED, TO IT, CAN BE IMPLIED.

Assuming that evidence of such a custom was admissible, yet the burden was on the appellant to establish the existence of such a custom by competent evidence. This the appellant absolutely failed to do. It did not offer evidence of any facts, tending to establish the existence of general custom, but relied entirely upon the speculative opinion of various persons in regard thereto.

It could not prove a custom in this manner. As stated in the case of *Willis* v. *Tibbals*, 33 N. Y. Superior Court, 220, at page 228:

> "A usage must be proved by evidence of facts, 'not by mere speculative 'opinion (Greenl. on Ev. §251; Stark. on Ev., Vol. 2, p. 361)."

The testimony must be not as to what the witnesses understood, but what was done in numerous instances and acquiesced in by the parties.

In *Allen* v. *The Merchants Bank of New York*, 22 Wendell (N. Y.) 215, the Chancellor said at page 222:

> "The custom of merchants or mercantile usage does not depend upon the private opinions of merchants as to what the law is, or even upon their opinions, publicly expressed—but it depends upon their acts; or, as the learned Chief Justice very correctly says: 'The inquiry in such cases is not after the *opinions* of traders and merchants in respect to the *law* upon a mercantile question, but for the evidence of a *fact*, to wit, the usage or practice in the course of mercantile business in the particular case.'"

In *Mills* v. *Hallock*, 2 Ed. Ch. (N. Y.) 652, the Vice-Chancellor stated, at page 656:

> "A custom must be proved by evidence of facts (and not by mere speculative opinion); by means of witnesses who have had frequent and actual experience of the custom. The testimony of those who speak from report only, and not from particular instances within their own knowledge, if receivable at all, is of no weight."

In *Gallup* v. *Lederer*, 1 Hun (N. Y.) 282, Judge Daniels said, at pages 286 and 287:

> "To prove the existence of a custom, something more than the judgment or conclusion of the witness, called to support it, is required. A custom is the result of usage, and can only be properly shown, by proof of the usage from which it may be claimed to be derived. The inquiry in such cases is not after the opinions of traders and merchants, in respect to the law upon a mercantile question, but for the evidence of a fact, to wit, the usage or practice

in the course of mercantile business in the particular case."

In the case of *Ames* v. *Kimball*, 125 Fed., 332, Judge *De Haven* said, at page 335:

> "The defendant sought upon the trial to show a local usage at the port of Nome exempting persons engaged in lightering merchandise from liability for loss or damage to such merchandise occasioned solely by perils of the sea, but the evidence offered was not sufficient to establish such a usage. No witness testified to any instance in which such a usage had been recognized and acted upon by the parties interested, when goods had been lost or damaged by perils of the sea while being lightered to the beach at Nome. Two witnesses stated generally that there was such a usage; but one seems to have based his statement upon the fact that he had previously entered into an agreement with the North Coast Lighterage Company to do lighterage for him, in which it was agreed that the lighterage company was not to be liable for damage or loss of goods while in transit from the ship to the shore; and the other, upon conversation he had had with persons engaged in the business of lightering, in which he was informed by them that they would not be responsible for loss or damage occasioned by perils of the sea. This evidence is certainly not sufficient to establish a usage. 'Usage is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses, testifying of its existence and uniformity from their knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates.'"

See also:

Oelricks v. *Ford*, 23 How. (U. S.) 49.
The John H. Cannon, 51 Fed., 48.

When the testimony of the witness, called by the appellant to prove the alleged custom, by which it is claimed the understanding was that the bank was to have a lien on the securities obtained by Fiske & Co., by the use of the money borrowed, is examined and judged by the test established by the above decisions, it is seen to be clearly incompetent and insufficient. It is not testimony as to facts, but only the opinion of witnesses, as to what they think their legal rights to be, or as to their hopes in regard to the transaction.

Mr. Roe, the Cashier of the bank, for instance, testified:

> "The custom is, that a broker will send in a request for a credit when he requires the same to clear his stocks, and the amount is credited to his account on the ledger, under the agreement which we have on file with all brokers. The broker then uses that credit to accept the delivery of stocks, and pays for them, or to pay off a loan with another institution, and it is customary for him to send a deposit of the checks which he receives to the bank as fast as they are received. * * * That is, immediately making the deposits without delay, or the securities to cover the amount of the advance made for the purpose of clearing their stock (p. 115). * * * The deposits are sometimes made 15 or 20 minutes after the payments are made; sometimes deposits are received later (p. 116). * * * The custom is, that if the deposit is not forthcoming immediately, to call up the broker or send around and ask why the deposit has not been received, and to hurry them up (p. 117). * * * If the checks and deposits are not sufficient, the loan is cancelled; another loan is put through for the proper amount that is necessary" (p. 119).

How little of this testimony is based on actual facts and how much more on opinion, is evident.

when we examine, what the cashier testified was done in the case of Fiske & Co.

Fiske & Co. had signed the usual agreement when they started business with the bank. When they wanted a loan, they sent in a simple written request for the same, and the same was credited to their general account, with the other moneys which they had on deposit (pp. 80, 81).

It does not appear, from his testimony, that anything was ever said as to how the money, thus loaned to Fiske & Co., should be used by them. Mr. Roes testifiefid that they could draw their checks against it (p. 120). The loan was always paid off by Fiske & Co. by check, later in the day (pp. 81, 83-84). On the few occasions, when the amount on deposit in Fiske & Co.'s account was not sufficient for them to draw a check to pay off the loan, they did not pay off the loan by sending around securities, *but made a new loan upon collateral, which was credited to their account ,and then paid off the original loan by check* (pp. 82, 83).

There is no proof that the moneys, deposited by them and against which they drew their check each afternoon to pay off the loan, was the money realized from or borrowed on the stocks which were obtained with the money borrowed from the bank. In other words, all the cashier testified to of his own knowledge was, that a loan was made in the morning, that it was usually paid the same day, and that it was obtained by moneys deposited by Fiske & Co. How Fiske & Co. or any other brokerage firm used the moneys borrowed, whence they derived the moneys with which they paid the loan, was absolutely unknown to him. It was merely his guess or speculation.

His assertion that it was the custom that if the brokers did not pay the loan in cash, they were to deposit the securities obtained by them with the

moneys loaned by the bank, is merely an expression of the opinion of the witness as what ought to be done by the brokers. It is not a statement of a fact, *nor does the witness give a single fact* upon which he bases his opinion. It does not appear that Fiske & Co., or any other brokerage firm, ever gave securities to secure a daily loan; but, on the contrary, it appears that in every case the loan was paid in cash.

His testimony it not, therefore, evidence of any custom, but a statement of his legal interpretation of the transaction, and of his expectations as to what the parties were going to do, and does not in any way establish the defendant's contention as to the existence of the custom in question.

The next witness called by the defendant upon the question of custom was Henry R. Carse, the Vice-President of the Hanover National Bank. His testimony as to the custom is as follows:

> "The broker, in the morning, figuring up the amount of stock or securities he has to pay for, or the loans that he has to turn over, makes up a demand note for a round amount and sends it up to our loan desk with his pass-book; we make a loan for that amount, and enter it in the pass-book, and credit it on the ledger. A memorandum of this amount is made on the certification book, together with the amount of the balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account; and against such credit we certify checks that are presented during the course of the day by the broker. *When the day's work is cleared up, the broker sends up a check to the loan clerk for the same amount as the notes.* We stamp the note 'paid' and return it to him. The check going through the books as a charge, offsets the credit that was made on the loan of the morning" (pp. 217-218).

> * * * "It has developed a form of trust, and the clear understanding implied between the broker and the bank is that whatever the broker obtains by the proceeds of the loan given to him is held in trust for the account of the bank, and is to be accounted for during that day. It being clearly understood that in no case shall this accommodation run beyond the day on which it is granted. If the broker pays for stocks or bonds, it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply retains possession of them long enough to make delivery and get payment. If the proceeds of the credits are used to pay for the loans which are already secured by collateral, the bank expects that collateral to be placed in another loan, which might either be with them or some other institution, and the proceeds of that loan would pay for this temporary loan, as we generally call it. These things are known as 'temporary day loans,' for the purpose of clearing the broker's business" (pp. 219-220).

The first part of the above testimony, except as to the manner in which the amount of the loan was figured, is a statement of the facts known to the witness in regard to these loans, but the latter part, that is, the part which begins with, "It has developed a form of trust, etc.," is clearly a statement of the witness' legal conclusions. This is evident from the language used by him and from his testimony on cross examination.

He knew that unsecured loans were made daily to stock brokers, and always paid in full the same day, by a check drawn against deposits made during the day by the broker. That was all he did actually know. He could guess for what the checks were being certified or what moneys were being deposited, but he could not tell positively (p. 233). He admitted this, and he also admitted that it made no difference to the bank, so long as the loan was

paid, where the money to pay it came from (p. 234).

In spite of his knowledge of these facts, the witness came to the belief and legal conclusion that, whatever the broker obtains with the proceeds of the loan, were held in trust, and testified that such was the custom. *However, the opinion and belief of the witness is immaterial.* It is not proof of anything. The Court can reach its own conclusion on the facts without the help of the witness, and his testimony, that the transaction was a form of trust, should be absolutely disregarded.

The statement of the witness that the securities, taken up by the broker, belong to the bank as collateral was likewise only his opinion. It certainly was not based on facts or personal knowledge, *for never had he known a case where the loan of the morning was not paid in cash on the same day, but security given* (p. 230).

On one occasion, where the broker did not have sufficient funds to pay the loan of the morning, the bank had not taken securities as collateral, but had made the broker a new loan upon collateral, and, with the credit thus received, the broker had paid the loan of the morning (p. 230).

As showing, that no lien was claimed upon the collateral, obtained by use of the day loan, Mr. Carse testified, that in cases, where the broker was short of money, with which to pay the day loan, he would make a new loan on any securities that were good, whether they were the result of the transaction with this day clearance money, or not" (p. 230).

His statement, that the securities, taken up by the broker, belong to the bank, therefore, was without foundation in fact: it was merely based on opinion, not upon what had been done in many instances and acquiesced in, and, taken with the rest of his testimony in regard to the existence of the alleged

custom, is entitled to no weight and should be absolutely disregarded.

The testimony of Mr. Alexander, Vice-President of the National Bank of Commerce, is not only subject to the same criticism, as has been made of the testimony of Messrs. Roe and Carse, but should also be disregarded because the form of the note used by the National Bank of Commerce expressly provided that the bank should have a lien on securities or the proceeds thereof, obtained with the money loaned by the bank, and his testimony, therefore, is not as to what occurred by reason of any custom, but by express agreement (pp. 444-446).

The fact, however, that this large bank insisted on an express agreement, casts much doubt upon the existence of the general custom claimed by the defendant.

The only other proof, by which the defendant attempted to establish the existence of the custom in question, is the stipulation (pp. 262-270), as to what certain bank officers and certain stock brokers who dealt with the said banks would testify to, the stipulation being in place of their testimony and being made subject to the objections which the plaintiff made in regard to all the testimony offered as to custom.

This stipulation, however, adds nothing to the appellant's case, for it is merely that the officers of these other Wall Street banks would testify in substantially the same manner as the witnesses Carse and Alexander testified, but as these witnesses did not testify to any facts, which showed the existence of any custom, the testimony of additional witnesses to the same effect could not strengthen appellant's case.

Similarly, the testimony of the stock brokers would have added nothing, for they would merely have corrobated the bank officers, that the loan was

made in the morning, the proceeds usually used to take up securities and pay off loans, and the loan was paid before the end of the day by check drawn against deposits made by them during the day (pp. 266-268). It does not appear, that they could have testified to any facts, showing, that it was the mutual intention, that the bank should have a lien on the stocks or the proceeds thereof, obtained with the money loaned by the bank, but, on the contrary, their testimony as stipulated expressly negatives the existence of any custom to this effect, *for it appears therefrom, that the loan was credited the same, as other moneys in the brokers' general deposit account; that the brokers mingled both the securities and moneys so received by them with other securities and moneys in their possession, and did not keep a separate account of the transactions, had with the moneys borrowed from the bank; that the loans were always paid by check and not by the deposit of securities; that when the brokers were short of funds, with which to pay the day loan, a new loan was negotiated, wherever obtainable, and, if obtained from the bank making the day loan, the securities, used as collateral for such loan, were any securities in possession of the brokers, from whatever source and however acquired by him. After the new loan was thus obtained the day loan was paid by check* (pp. 267-268).

Not only did the appellant fail to prove the existence of the alleged custom, but the evidence affirmatively establishes that no general and uniform custom existed. As stated in *Willis v. Tibbals*, 33 N. Y. Superior Court, 220, at page 230, the Chancellor said:

> "Usage must be established, known, certain and uniform."

The banks and brokers, however, do not seem to have adopted a uniform method of doing business in regard to daily loans to stock brokers.

The appellant bank obtains a general agreement from the customers. The Hanover National Bank, and the National Bank of Commerce demand note containing various provisions as to security. The form and substance of the notes of the two banks being substantially different (pp. 440-446). The First National Bank requires a demand note, in which the securities, to be given as collateral, are stated, and the Bank of Manhattan Co. does not obtain any note or agreement whatsoever (pp. 263-266). As stated by Mr. Alexander, they do not have uniform forms (p. 244).

Even the witnesses' opinions of the transactions, when examined closely, differ substantially. The answer sets forth that the money is borrowed to meet current obligations, and that the loan should be paid off at various times during the day (p. 20). The opinion of the witnesses was that the loan was to take up particular stocks, and that the loan was not paid off from time to time during the day, but in every instance by a check for the whole amount of the loan at the close of the day.

In many other respects, their testimony will be found to differ. Each bank seems to have adopted its own way of doing business, and each officer to have his own ideas in regard thereto.

Taken as a whole, the testimony as to custom is absolutely inconclusive. There are no facts on the record to show the existence of any custom. The only testimony is that the speculative opinions of witnesses and, under the decisions, that is no proof at all.

No witness testified to a transaction, by which the securities, obtained by the broker from the pro-

ceeds of the day loan, were pledged, as security for any part of such loan.

The learned Master in his opinion (pp. 297, 298) convincingly discusses the testimony as to the alleged custom, and says (p. 297):

> "This testimony fails to show the existence of any custom by which the securities obtained by the broker with the proceeds of the day loan were pledged as security for any part of such loan."

He then proceeds to give his reasons for this conclusion, and shows not only that no witness testified to such transaction, but that in each case and with each bank, where collateral securities were delivered to the bank, it was for the purpose of making a new loan, the proceeds of which were used to pay the day or clearance loan.

His final conclusion at pages 297, 298 is most forceful.

> "The conditions, therefore, do not exist out of which any custom or usage could arise. The custom as to security for unpaid debts cannot arise where all debts are promptly paid. If there are no unpaid debts and no debtors in default, there can be no established usage in relation to unpaid debts."

D.

THE METHOD, IN WHICH BUSINESS IS TRANSACTED BY THE APPELLANT AND OTHER WALL STREET BANKS WITH STOCK BROKERS, IS INCONSISTENT WITH THE EXISTENCE OF THE MUTUAL INTENTION, THAT THE BANK WAS TO HAVE A LIEN ON SECURITIES, OBTAINED WITH THE PROCEEDS OF THE LOAN.

According to the testimony, the daily loans made by the banks to brokers are always paid off in

cash before the end of the day on which the loan is made. This is true, even if the securities, obtained with the proceeds of the loan, have not been sold or otherwise disposed of by the brokers (pp. 228, 230, 222, 252, 267, 268, 121). It is the evident intention of the parties that the loan shall be paid in cash. It is immaterial to the bank with what funds the loan is paid, so long as it is paid by the broker (pp. 234, 256, 266, 267, 228, 121).

If the agreement were, as contended by the appellant, that the bank in each case was to have a lien on securities obtained with the proceeds of the loan, then the broker should, merely, turn over to the bank at the close of the day the said securities, or the proceeds thereof. The fact, that he always does, and is expected to, pay for the loan in cash, is inconsistent with the existence of an agreement, such as the appellant claims.

If, at the end of the day, a broker has not the cash to pay the loan obtained by him in the morning, *he does not deliver to the bank the unsold securities, obtained by the use of its money, but obtains a new loan on collateral and pays off the loan of the morning by check* (pp. 83, 220, 222, 268). He is expected to get this loan from some bank other than that, making the day loan, and not to force loans on the bank (p. 222). The collateral, used in securing the new loan, is not necessarily the securities, obtained by the use of the bank's money but is any collateral, satisfactory to the bank (pp. 268, 230). This again is inconsistent with the claims of the appellant, that the securities, obtained by the use of the bank's money, are to be turned over to the bank, as security for the morning loan.

Furthermore, if such an understanding existed, we should expect the banks to keep the moneys, loaned to the brokers, separate from the other moneys of the brokers, on deposit with them, and

to insist, that the brokers keep separate account of the said moneys and of the securities obtained by ~~by~~ the use thereof. The admitted practice, however, is, in each case, that the bank credits the moneys, loaned to the broker by it, in the same account with the other moneys of the broke on deposit with the bank (pp. 80, 228, 255). When the broker subsequently pays for his securities by drawing a check against his said account, it is impossible to tell whether he is paying for said securities with the money borrowed from the bank, or with his other moneys.

This state of facts is not brought about by any wrongful action on the part of the broker. The bank voluntarily does business this way. If there were any agreement that it was to have a lien upon the securities obtained by the use of the day loan, the bank would not make it impossible for the agreement to be effective by thus mingling the moneys loaned with the broker's other moneys. If the intention were to create a lien on the proceeds of the loan, it would not only keep the loan separate itself, but it would insist that the broker keep a separate account of the moneys borrowed and of his use thereof.

It does not, however, expect or require him to do so. On the contrary, the broker, with the knowledge and acquiescence of the bank, treats the securities acquired by the use of the daily loan as his own, free from any lien (pp. 267, 233, 255).

All this negatives the existence of an understanding, that the bank is to have a lien on securities, obtained by the broker by the use of the money borrowed or on the proceeds thereof.

The nature of the broker's business is entirely inconsistent with the position taken by the bank. It must be remembered that, on each day, he must pay out large amounts for the securities purchased, and deliver quantities of securities against sales,

made by him; that, in so doing, he is not dealing with securities, which belong to him, but that he is acting on behalf of his customers and with the property of his customers. *In some instances, where he has purchased securities, the customers already have a credit with the broker sufficient to pay for the securities purchased, or have theretofore delivered to the broker the securities sold. The broker, when he borrows the money from the bank each day, uses it, indiscriminately, to pay for the securities thus purchased for his customers, yet, as the securities, thus obtained, are the property of his customers, he has, in many cases, no right to pledge the same with the bank. He has no right at all to pledge the securities, which have been already paid for, nor to pledge those, which have been only partially paid for, in general loans, with the securities of others, where the amount of the loan has no relation to the amount owing by the customer thereon.*

Douglas *v.* Carpenter, 17 App. Div. (N. Y.), 329.

Rothschild *v.* Allen, 90 App. Div. (N. Y.), 233.

Thompkins *v.* Morton Trust Co., 91 App. Div. (N. Y.), 274.

Strickland **v.** Magoun, 119 App. Div. (N. Y.), 113.

The bank knew this. It knew that it was dealing with a broker, not with the owner of the property, and therefore knew that the broker could not legally make such an agreement, as is contended for in this case. Even assuming that the securities belonged to the broker, and he had a right to pledge them, it further knew that he must of necessity redeliver the securities, obtained by him, in the performance of contracts of sale, and deal with

them generally as though they were his own property. It permitted him so to do, thus admitting that it had no agreement with him such as is now contended for.

The learned Master, in his opinion, at pages 298-302, clearly sets out the nature of the broker's business, showing that it is necessary for him to have the use of the stocks for the purpose of making deliveries thereof, and that the banks making the day loan permit him so to do, and that all that they require is, that the loan shall be paid each day. He sums it up as follows (p. 300):

> "In other words, the result of the day's transactions leads to payment of day loans and not to their security, and such is the understanding and intent of both borrower and lender."

The learned Master further says (p. 301):

> "I am unable to see how the day loan could be of any benefit to the broker, unless, as the stipulation 'states' the securities obtained by the day loan 'were freely and at all times used by him' (the broker), to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans, or were substituted for other collateral then in demand, or time loans."

A careful consideration of the method, in which the business is transacted and of the necessities of the business of the brokers, shows that the bank, in each instance, in making the loan, does not do so upon the securities. It makes the loan without collateral because it wants the broker's other business. It knows that the broker needs money daily in order to carry on his business and that he must repay the money each day to the bank, if he is to continue in business. The moment he makes a

default or loses his credit, his business is wrecked. The bank, knowing these facts, and making sure that it is dealing with a reputable concern, is willing to run the risk of making a temporary unsecured loan. It is willing to trust to the good faith of the broker. In view of the fact that the loan must be paid the very day on which it is made, it is extremely unlikely that there will be any default.

E.

THE TRANSACTIONS BETWEEN THE APPELLANT AND FISKE & CO. ON JANUARY 19TH, THE DAY OF THE FAILURE OF FISKE & CO., ARE INCONSISTENT WITH THE EXISTENCE OF AN AGREEMENT, THAT THE BANK WAS TO HAVE A LIEN UPON THE SECURITIES OBTAINED BY THE USE OF ITS MONEYS AND THE PROCEEDS THEREFOR.

It is impossible to reconcile the action of Mr. Roe, the cashier of the appellant, when he called at the office of Fiske & Co., and obtained the securities in question, with the existence of such an agreement. He did not go to the office of Fiske & Co. and ask for the securities obtained by them through the use of the money, loaned by the bank, but he went there and asked generally for securities, not concerning himself with the source from which they were derived. He took anything, that was given him, without looking to see whence it had come into the possession of Fiske & Co. He did not require any accounting by Fiske & Co. as to their use of the money borrowed that morning from the bank.

If the agreement were that the securities, obtained with the money borrowed, were to be subject to a lien of the bank, we would expect him to ask Fiske & Co. to account for the moneys and to produce the securities obtained by the use thereof and upon which the bank claimed to have such lien. He

did nothing of the sort, however. He merely made a general demand for securities and took whatever he was given, thus demonstrating that the only right, which the bank had, was under the agreement to demand further security.

Another circumstance, which negatives the appellant's contention is that, according to its claim as set forth in the schedule annexed to the appellant's brief and marked "Appendix A," a portion of the money, borrowed by Fiske & Co. from the appellant on January 19th, was used to pay off a loan of $15,000, theretofore made by the appellant to Fiske & Co. and secured by 200 shares of U. S. Steel Common, 10 shares of Slows-Shef Steel & Iron Company, and 10 shares of Chicago & Alton. The bank, on payment of the said loan of $15,000, re-delivered to Fiske & Co. the aforesaid securities, which, in turn, were handed back to the bank, together with the other securities handed to Mr. Roe when he called at the office of Fiske & Co. at noon on January 19th.

If the agreement were that the bank should have a lien on these securities to secure the morning loan of $400,000, why did it surrender the securities to Fiske & Co. when the loan of $15,000 was paid? If it had a lien on these securities to secure the loan of $400,000, it would and should have retained possession thereof on payment of the loan of $15,000.

F.

CUSTOM WAS INADMISSIBLE TO VARY THE WRITTEN AGREEMENT BETWEEN THE PARTIES, AND THE APPELLANT COULD NOT PROVE AN AGREEMENT THAT IT SHOULD HAVE A LIEN ON SECURITIES IN THE POSSESSION OF FISKE & CO. BY PROOF OF A CUSTOM TO THAT EFFECT. PROOF OF CUSTOM IS NOT ADMISSIBLE TO VARY A CONTRACT OR TO MAKE A DIFFERENT OR ADDITIONAL CONTRACT OR CHANGE THE LEGAL RIGHTS AND LIABILITIES OF THE PARTIES AS ESTABLISHED BY LAW.

We do not dispute, that custom is admissible, to explain the meaning and intention of the parties to a contract, but we claim, that, in the case at bar, it was introduced in an attempt to change the legal status of the parties and that the appellant was seeking, by proof of alleged custom, to secure for itself equitable rights in certain property of Fiske & Co., which rights were not given it by law or by the contract. We do not admit, that the alleged custom, if proven, would have had that effect, but assuming in this point, for purpose of argument, that it would, we contend that proof of custom was not admissible for that purpose.

The law is well established, that custom cannot be proved to alter a contract or change the legal status of the parties.

The proof of custom herein was not introduced for the purpose of explaining the meaning of the contract or the intention of the parties, but for the purpose of varying the contract made between the parties and of making a different or additional contract and changing the legal rights and liabilities of the parties as established by law.

As stated in the case of *The Delaware* v. *The Oregon Iron Co.*, 81 U. S., 579:

"Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import, and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, *but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties.* Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but *it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law.*" (Italics ours.)

See also:

Barnard v. *Kellogg*, 10 Wall (U. S.), 383.
First National Bank v. *Burkhardt*, 100 U. S., 686.
Thompson v. *Riggs*, 5 Wall (U. S.), 669.
Oelricks v. *Ford*, 23 How. (U. S.), 49.
Hopper v. *Sage*, 112 N. Y., 530.
Markham v. *Jaudon*, 41 N. Y., 235.
Minnesota Rway. v. *Morgan*, 52 Barb. (N. Y.), 217.

The bank and Fiske & Co., furthermore, in this case did not rely upon a custom. They rather chose to define their rights and liabilities in a written agreement. If a custom existed, by omitting it from their agreement, they expressly elected that it should not apply to transactions under the agreement.

POINT II.

The appellant failed to prove that any of the securities and moneys, deliverd to it on January 19th, were obtained by Fiske & Co. through the use of the money borrowed by them from the appellant.

At the trial of this action, the appellant did not offer any proof to show the connection between the securities and moneys transferred to it and the $400,000 borrowed from it by Fiske & Co. on January 19th. It has, however, by great ingenuity, worked out two schedules contained in its brief (Appendices A and B thereof), which are based upon the entries in the books of Fiske & Co., which were offered in evidence by the appellees and received in spite of the appellant's objection.

The appellant now claims that these schedules prove that the securities and moneys transferred to it were obtained by the use of the money borrowed that day from it. We contend the entries do not prove this. We shall not, however, go into this matter in detail, except to point out two very material omissions or faults in the proof.

The appellant assumes that, in every case, where stock was obtained by a check drawn on the appellant bank, that check necessarily represented a portion of the $400,000, borrowed by Fiske & Co. from the bank on the morning of the 19th. Such, however, is not the case. On the morning of the 19th, before the loan was made, Fiske & Co. had on deposit with the bank over $36,000. Thereafter, the loan was credited to the same account, and, when Fiske & Co. drew checks against said account, it was impossible to tell whether the checks,

so drawn, were drawn against the moneys loaned to Fiske & Co. on the morning of the 19th or against the moneys previously deposited by them with the bank. It is, therefore, impossible to tell whether any particular securities were purchased with money borrowed from the bank, or other moneys of Fiske & Co. There is, therefore, no sufficient proof that the securities, delivered to Mr. Roe on January 19th, were securities purchased with the money borrowed from the bank.

The appellant did not claim, in its briefs either before the Special Master or the courts below, that it had traced the sources of the checks comprising the deposit of $54,048 18. It merely claimed the right to hold the said money upon the principle of set-off. It annexes to its present brief, however, a schedule (appendix B), by which it seeks to trace the source of the said deposit. It is clear, however, from the said schedule, that many of the securities, the proceeds of the sale of which are claimed to form part of the deposit, were, according to the appellant's own statement, obtained by Fiske & Co. by checks drawn on the Mechanics' Bank prior to January 19th (see 6th column of said appendix, page 116, of Appellant's Brief).

Obviously, the securities, paid for or released by checks drawn prior to January 19th, that is, prior to the making of the loan of $400,000, cannot be said to have been traced to the said loan, or to represent the proceeds of securities, obtained by the use of the said moneys borrowed on the 19th.

The appellant admits, in its brief, it cannot trace over $5,000 of the alleged deposit and ten shares of Interborough-Metropolitan stock. Without proof, that the securities and moneys, transferred to the appellant on the 19th, were obtained by the use of the money, borrowed by Fiske & Co. on that day, the appellant must utterly fail to its defense. Even

if it were an express intention, that the appellant bank should have a lien on the securities obtained by the money borrowed from it, such intention would not avail the appellant, because of its failure to connect the said securities and moneys with the said loan.

POINT III.

Even if the mutual intention and agreement in this case were that the appellant was to have a lien on the securities or the proceeds thereof obtained by the use of the money borrowed from it, such agreement was ineffective and void, because it was too vague and uncertain in character and because of the manner in which the transactions between the bank and Fiske & Co. were had.

It was unnecessary for the Master and the Courts below to pass upon the above point, as they found the custom and agreement, claimed by the appellant to exist, was not proved by it. This finding of fact disposed absolutely of the defense herein.

As we believe this Court will agree with the Special Master and the courts below in respect to the said finding, we shall only set forth the following propositions of law briefly. We do not, however, wish the Court to infer from this that we do not place reliance upon the said points and are not convinced of the soundness thereof.

A.

In order for a valid, equitable lien to exist, there must be, not only a clear mutual intention, that one party shall have a lien on the property of another, not delivered to him, but it must be the present intention to create a lien. An agreement to give a lien or security in the future is not enough. The transaction must be judged, as of the time the lien is actually created.

Re Dismal Swamp Contracting Co., 135 Fed., 415.
Mathews v. *Hardt*, 79 App. Div. (N. Y.), 570.
Re Faulhaber Stable Co., 170 Fed., 68.
Re Klingaman, 101 Fed., 691.
Zartman v. *First Nat. Bank*, 189 N. Y., 267.
Ryttenberg v. *Schefer*, 131 Fed., 313.

In the case at bar, if there were any intention, that the bank should have any lien on the securities obtained by Fiske & Co. with the use of the money borrowed, it is clear, that such lien was only to exist and be effective, if Fiske & Co. failed to pay the loan in cash. The distinct understanding was that the loan was to be paid in cash, and that the securities were not to be forced on the bank. Therefore, it was without present consideration and voidable as against the trustee.

Johnston v. *Huff, Andrews & Mayler Co.*, 133 Fed., 704.

B.

There cannot be an equitable lien, unless the property, which is to be subject to such lien, is designated and identified and appropriated to the use of the lienor.

Adams v. *Citizens' Bank of Tina*, 84 Fed., 270.
Re Dismal Swamp Contracting Co., 135 Fed., 415.
First Nat. Bank of Holdrege v. *Johnson*, 10 Am. Bkpcy., 208.
Lighthouse v. *Third Nat. Bank*, 162 N. Y., 336.
Hazenwinkle Grain Co. v. *McComb*, 116 Ill. App., 541.

There was no such separation and identification in the case at bar. The securities in question were not yet in the possession of Fiske & Co. when the loan was made; nothing was said or done by Fiske & Co. to indicate what, if any, securities were to be obtained by them with the money borrowed; Fiske & Co., according to the appellant's answer, would use the money to meet any "current obligations" (p. 20); this would include general office expenses; *the moneys were mingled by the bank with other moneys of Fiske & Co. This was done by the bank itself and was not a wrongful act on the part of Fiske & Co.*

It was impossible to tell, if the securities were purchased with the money, borrowed from the bank, or not.

There was no appropriation of the property, over which the equitable lien or right was claimed, to the use of the bank. All securities coming into the hands of Fiske & Co. were intermingled and treated by them as their own. The proceeds of the securities, when disposed of, were not absolutely assigned to the bank. Even if there had been a promise on the part of Fiske & Co. to pay the bank out of the proceeds of the securities obtained by them during the day, this would not constitute an appropriation of the money to the use of the bank, such as is necessary for the creation of an equitable assignment or right, such as was claimed by the bank.

Christmas v. *Russell's Executors,* 14 Wall (U. S.), 69.
Re Faulhaber Stable Co., 170 Fed., 68.
Wright v. *Ellison,* 68 U. S., 16.
Burke v. *Child,* 88 U. S., 441.
Torrance v. *Winfield Nat. Bank,* 71 Pac., 235 (11 Am. Bkpcy. Rep., 185).
Smedley v. *Speckman,* 157 Fed., 815.

Pettibone v. *Thomson*, 12 *Misc.* (N. Y.), 486.

C.

Even, if the intention was to create a lien, such lien was fraudulent as against creditors, and voidable by the Trustee, for the reason that Fiske & Co. were to retain possession of the property, which was to be subject to the lien, together with the right to sell and dispose of the same and to treat it as their own. This is shown by the general method in which the business is done. A lien created under such circumstances, is fraudulent at law and voidable by the trustee.

Skilton v. *Codington*, 185 N. Y., 80.
Re Liberty Silk Co., 152 Fed., 844.
Re Garcewich, 115 Fed., 87.

D.

Any agreement, expressed or implied, between the parties, for the creation of an equitable lien herein, was waived. The various acts of the parties, inconsistent with the existence of an agreement for a lien, heretofore pointed out, constitute a waiver of any agreement for a lien.

These acts are briefly as follows: The crediting by the bank of moneys borrowed to the general account of the broker, thus mingling them with his other funds; the insistence of the payment of the loan in cash; the making of new loans to the broker, when he did not have the cash to pay the day loan, instead of the acceptance of the stocks as security for the day loan; the fact that the bank permitted the brokers to intermingle stock obtained by them from all sources; the failure of the bank to make the brokers keep a separate account of the

moneys borrowed; the fact that the loans could be paid with any funds; and the general manner in which business is conducted.

All these facts show that, whatever the parties may have originally agreed to or whatever may have been their original intention, they, in their practice, departed therefrom. We must judge the transaction by the actions of the parties, and, if the actions are contrary to the agreement, they constitute a waiver thereof. The actions show that there was no equitable lien.

E.

Appellants' Cases Reviewed.

The cases of Sexton v. *Kessler & Co., 225 U. S., 90, and Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co., 213 U. S., 126, and the other cases cited by the appellant do not sustain its contention.*

Neither of the above named cases, cited by the appellant, as supporting its proposition, has any application to the case at bar, because the facts in those cases are entirely different from the facts in the case at bar.

The decision in the case of Sexton v. Kessler, *supra*, was based upon the fact, that an agreement had been made long before the insolvency, by which the New York firm had set apart certain specified securities for the benefit of the English house, its creditor. The creditor had been notified that the debtor had placed in its safe certain named securities, as a protection against the latter's drawings. The only question considered was, whether the continued physical power of the New York firm over these securities and its right to withdraw and substitute, admittedly reserved, were inconsistent with the title or lien of the English house, and the

Court held that an equitable lien was created, and when the English house took the securities, it only exercised a right, that had been created before the bankruptcy and in good faith *by express contract.*

In the case at bar there was no contract and the property, upon which the lien is claimed to exist, was indefinite.

The appellant argues that it was possible to trace out the securities, upon which a lien is claimed to exist, and that the transaction is, therefore, the same as if they had been separated. However, in the Kessler case, the separation of the pledged property from the other property of the bankrupts was complete. Even though substitution was permitted, there were ~~also~~ certain securities held separately and not used by the firm in the course of its business.

In the case at bar, the bankrupts, with the knowledge and acquiescence of the bank, used the property, upon which a lien is claimed in the ordinary course of their business, mingling it with their other property and treating it as if it were free from the lien.

In the Sexton v. Kessler case, the Court said, at page 98:

> "So, a general promise to give security in the future is not enough, but the present was a more limited and cautious dealing. It was confined to specified identified stocks and bonds on hand and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal, if the remaining securities had risen sufficiently in value. It purported not to promise, but to transfer."

In the case at bar, even admitting, for the sake of argument, that the agreement by custom was to give a lien, there were, as above shown, no speci-

fied securities set apart for the bank and separated from the rest of the bankrupt's property. The transaction, at the most, was a general promise to give security in the future. It purported to promise, not to transfer.

The distinction between the case of Hurley v. Atchison, Topeka & Santa Fe Ry. Co., *supra*, and the case at bar, is well pointed out by Judge Hand in his opinion in Hotchkiss v. National City Bank (page 345 of the record herein):

> "The money which the road paid in advance for the coal was the purchase price of an agreed quantity of coal actually in existence. It was meant to give the road the right to demand from the seller a certain amount of coal in its possession, which, though not yet set apart from bulk, was still definable in quantity. There was a specific interest in the res which survived bankruptcy."

The case is entirely different from the case at bar, where the transaction was a loan and the subsequent giving of the security.

A careful reading of the case of Hurley vs. Atchison, Topeka & Santa Fe Ry. Co. makes this distinction very clear, for Justice Brewer, in his opinion, clearly points out that the transaction is not to be considered "as one of an independent loan of money to the coal company," but that a purpose was implied that the coal as mined should be delivered, and, from an equitable standpoint, was to be regarded as a pledge of unmined coal to the extent of the advancement. Furthermore, in the Hurley case there was an express agreement that the railroad company was to have a lien. There was no such agreement in the case at bar.

In the case of Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed., 940, an agreement had been made long prior to the bankruptcy, by which

the creditor was given security upon the timber in the trade, the logs cut therefrom and the lumber manufactured from such logs, and the Court in its decision enforced the equitable lien thus acquired.

In that case, the agreement to give a lien was found to exist, and the property, upon which it was to be exercised, was definite and fixed.

In the case of Hauselt v. Harrison, 105 U. S., 401, there was also an agreement, entered into long before the bankruptcy, and at the inception of the dealings between the parties, in and by which it was agreed that all the skins, before delivery of possession to Hauselt under the contract for the purposes of sale, should be considered as security for advances made by him, and the Court's holding was, that such agreement created a charge upon the property, not in the nature of a pledge or mortgage, but as a lien good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors having executions or attachments, and, if followed by a delivery of possession before the rights of third parties intervened, it was good absolutely. It was further held that Hauselt could, by an action in equity, have prevented Bayer, from making any disposition of the property inconsistent with his obligations under the contract, and the Court, in order to protect the interests of Hauselt, could have placed the property in the custody of a receiver, with authority to finish the unfinished work, and, ultimately, by a sale and distribution of the proceeds, adjust the rights of the parties.

In Mills v. Virginia-Carolina Lumber Co., 164 Fed., 168, the decision was based also upon the fact, that an agreement had been entered into between the parties long prior to the bankruptcy, by which the party, advancing money, became entitled to an

equitable lien upon as much of the produce of the mill, as it had paid for.

It will thus be seen that in all the cases cited by the appellant in support of its claim, there was found to have been an agreement executed long before the bankruptcy, under which the creditor became entitled to an equitable lien upon the property or fund coming into the hands of the trustee in bankruptcy, and there was no question, but that the agreement had been made in good faith and was not merely a matter of form, or that the creditor had waived its rights by its method of dealing with the debtor. The property itself was also fixed and definite.

In the case at bar, the essential element of such an agreement made at the time of the transaction, or the existence of any facts or any ~~cause~~ of dealing from which such an agreement could be implied, is wanting, as we think we have successfully shown in our review of the facts. The property upon which the lien was to exist was not clearly defined, and the acts of the parties were inconsistent with the existence of the lien claimed.

F.

The case of Adams v. *Citizens Bank of Tina*, 84 *Fed.*, 270, *is directly in point and is a complete answer to the appellant's contention.*

In that case, Parsely & Markwell of Tina, Mo., partners, were engaged there in purchasing and shipping live stock for sale to the Chicago market, shipping mainly to Adams & Burke.

Parsley & Markwell were accustomed to pay for live stock which they purchased, by means of checks, which were *commonly over-drafts* upon the Citizens Bank of Tina, the bank being reimbursed by the net proceeds of sales, which, un-

der instructions to that effect from Parsley & Markwell, Adams & Burke were accustomed to deposit with the Drovers Bank of Chicago to the credit of the Citizens Bank of Tina, for the use or benefit of Parsley & Markwell. Parsley & Markwell purchased from Allamong & Sons a number of cattle for $8,012, and gave in payment a check on the Citizens Bank, which credited Allamong & Sons with the amount and thereby paid them. Adams & Burke had notice that the bank paid the purchase price and their agent, Lovell, in response to the bank, stated that the cattle would sell at Chicago for more than the amount of the check; that the live stock would be consigned to his principals, Adams & Burke, and that the proceeds would be deposited as usual to the credit of the Citizens Bank.

Thereupon, the Citizens Bank paid Allamong & Sons. Adams & Burke applied a portion, namely, $5,000 of the proceeds to pay a note of Parsley & Markwell and deposited only the balance. Suit was brought by the Citizens Bank against Adams & Burke for $5,000 on the theory that the bank had an equitable lien.

Held, the bank had no equitable lien on either the stock or the proceeds.

Woods, J., at page 272, said:

> "The case decided in *Bank* v. *Gillespie*, 137 U. S., 411, 11 Sup. Ct., 118, is broadly different from the present case. 'In equity' it was there said 'the Gillespies may properly be considered the owners. They paid for the cattle; the orders for possession, equivalent to bills of sale, were in their name; they controlled the shipments; and until their money advanced and stipulated profits were realized, they were equitably the owners and in control.' No such situation is disclosed here, either by averments or by proof. The Citizens

Bank, instead of being in the position of the Gillespies, did not pay for the cattle, did not receive bills of sale, or the equivalent, did not control the shipment, and, instead of being the equitable owners of either cattle or proceeds, had simply the legal liability of Parsley & Markwell to repay the money advanced by the bank, in accordance with their agreements made four or five years before, when they commenced business, that the bank should pay their checks given for stock purchased and they would 'have the proceeds come back to the bank.' That in effect was to extend credit to Parsley & Markwell, and not to create a lien or equitable interest for the benefit of the bank, either in the live stock purchased or in the proceeds thereof. The inference that no more than this was intended by the parties is further justified by the consideration that Parsley was a man of affairs in close relations with the bank, and that in the course of business adopted, whereby the bank was accustomed to receive prompt notice of sales and of the deposits made of the proceeds, it would receive timely information of any disposition of the proceeds of a sale contrary to the agreement or custom, as it did in the instance complained of."

At page 273:

"In respect to the particular shipment in question, while it appears that the bank made inquiries of Lovell and obtained of him statements, which, if he had the requisite authority to bind them, might be deemed to show an agreement by Adams & Burke to deposit in the usual way the proceeds of the pending consignment, it is to be observed that Parsley & Markwell were not present, nor, so far as it appears, cognizant of what was said between the Cashier of the bank and Lovell :and without their participation it would seem to have been impossible that,

by reason of anything said by Lovell, the bank should have acquired a special interest in the proceeds of the transaction. Besides it is evident on the averments of the bill that whatever assurances Lovell gave was a matter of opinion based on the custom of business and was not a promise that the proceeds of this consignment should be deposited to the credit of the bank. The bank relied on no such promise, but solely, as it is alleged, 'upon the good faith theretofore observed by Adams & Burke.' It is beyond question that the Cashier, who acted for the bank in the premises, expected that the proceeds of the consignment would be deposited to the credit of his bank, and that Lovell knew of that expectation; but it is, at the same time, true that the bank had no lien upon the cattle or control of the shipment, and therefore, had no equitable ground for pursuing the proceeds of the sale into the hands of Adams & Burke, who applied the amount in controversy to the payment of an obligation which they held against Parsley & Markwell, who had authorized the application."

POINT IV.

The transfer of the moneys and securities in question constituted a voidable preference under the provisions of the Bankruptcy Act.

A.

THE FIRM OF J. M. FISKE & COMPANY AND THE INDIVIDUAL MEMBERS THEREOF WERE INSOLVENT AT 12 O'CLOCK, NOON, ON JANUARY 19TH, 1910.

(1) *Introductory statement.*

This question of fact was fully tried before the Special Master and his finding in appellees' favor is found at page 284.

The Master was sustained in this finding by both lower courts.

Under well settled rules this finding should not be disturbed.

It would hardly seem to require argument now to demonstrate the correctness of this finding, in view of the fact that the firm suspended business at 12.40 P. M. of January 19th, and an involuntary petition was filed against them at 3.25 P. M. of the same day, and in view of the hopeless condition of the estate, as revealed by the testimony of Mr. Ernst, the Receiver, hereinafter referred to.

We are forced, however, to refer to the evidence on this subject somewhat in detail, because of the lengthy discussion, contained in appellant's brief.

The appellant premises its discussion of the proof on the question of the insolvency of J. M. Fiske & Company by a reference to the Bankruptcy Act, and the citation of a number of cases defining the word "insolvent" as used in the Act. There is, however,

no dispute in this case, as to the meaning of the word "insolvent." The definition of the word, as given in the Act, as construed by the Courts, and as set forth in the appellant's brief, was recognized by the appellees, when they proved their case, and by the Special Master and both the lower Courts, when they decided in the appellees' favor.

The appellees, in proving the insolvency herein, have also followed the rule quoted at page 74 of the appellant's brief:

> "Fair valuation is not what property would bring at a forced sale. The valuation used as a test must relate to the conditions existing in respect to the bankrupt's business as a going concern, at the time when the preference was given."

The proof offered by the appellees herein was directed to showing the valuation of the assets of the bankrupts, as a going concern, at the time of the transfer, to wit, 12 o'clock, noon, on January 19th.

The assets of the bankrupts, as is usual among stock brokers, consisted chiefly of stocks and other securities and accounts payable to them. The value of stocks and securities to a stock brokerage firm is naturally their value upon the "exchange" and the "curb." It is there that all the brokers' dealings are had. Whatever stocks may be worth to others, in the business of stock brokers, there is only one test of value, and that is the price shown by the ticker. The value of accounts due them is naturally figured, as in any other business. It is based, among other things, on the probability of their being collectible in the usual course of business.

(2) *Insolvency according to face of assets.*

The condition of the firm of J. M. Fiske & Company at 12 o'clock on January 19th, the time at which the securities and moneys in question were delivered to the bank, was, that it had liabilities of $904,570.02, and assets of the *face* value of $745,919.48. This appears from the testimony of Mr. Morse, the Accountant (p. 171).

Mr. Morse's testimony as to the liabilities was based upon the books of J. M. Fiske & Company. These books were shown by Mr. Humphrey, one of the members of the firm, who kept some of the books (pp. 36, 37) and who supervised the entries generally in all of the books (p. 38), to be correct and to show the financial condition of his firm (p. 33).

The bookkeeper, Isaacs, was also called, and also identified the books, and testified as to the correctness thereof (pp. 141, 139-141).

In the computation of the assets, Witness Morse took all the accounts shown on the ledger, with the exception of the firm accounts, at their face value (p. 173), and valued the securities on hand at their market prices at 12 o'clock on that day (p. 170). He took as a basis for his calculation, the market prices testified to by Mr. Oscar Bamberger, who was called, by the appellees, as an expert in regard to curb securities (pp. 147 to 151), the prices agreed upon by stipulation (pp. 151-157), and figured the price of Columbus & Hocking Coal & Iron at 58, which was the market price at 12 o'clock on that day, according to the testimony of Mr. Henry H. Cone (pp. 161, 162) (and see the allowance of $2,000 for the difference before and after twelve as agreed upon, p. 172).

(3) *The face value of $745,919.48 includes at least $443,833.55 uncollectible accounts.*

Mr. Morse testified that among the amounts

collectible, composing a part of the assets of the face value (p. 173) of $745,919.48, he had *included*, among others, the following accounts collectible, at their *face* value (pp. 173-175):

A. P. Morison Account	$34,732.69	
A. P. Morison Acct. No. 9.	34,292.40	
A. P. Morison Privilege Account	67,083.20	$136,108.29
Marcus Schnitzer		14,876.84
Pool No. 2, or 4/4 Account		152,642.79
C. M. Washburn	21,559.42	
C. M. Washburn, Special Account	4,422.71	25,982.13
John Felix		33,652.74
R. F. Little, Special	$14,269.72	
Account No. 1	13,973.84	28,243.56
G. T. Sullivan, Cotton Account	$5,840.00	
G. T. Sullivan, Grain Account	25,610.50	31,450.50
Sarah L. Stevens		3,817.20
Martha L. Stevens		3,836.21
Harry E. Stevens		4,348.83
Charles McLean		8,874.46
Making a total of		$443,833.55

Although these accounts, aggregating $443,833.55, were included at their face value by the accountant in his valuation of the assets of Fiske & Co. at $745,919.48, yet these sixteen accounts had no real value and should be eliminated in figuring the real value of the assets.

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A. P. Morison was called as a witness (pp. 146, 147) and testified that he was absolutely unable to pay his debts on January 19th. The fact, that the debt was uncollectible, is corroborated by the testimony of Mr. Fiske (p. 54), and further by the fact that this claim of $136,108.29 was subsequently settled by the Trustees for the sum of $10,000, which was to be paid by Morison in installments (p. 130).

The interest of Morison in certain mining and industrial concerns, referred to by the appellant in its brief, were all hypothecated. As a practical matter, the account was worthless (p. 147).

Marcus Schnitzer was called as a witness, and testified that, on January 19th, he had lost every dollar and nothing could be collected from him (pp. 121-125). This is corroborated by the testimony of Mr. Fiske (p. 58) and Mr. Wolf (p. 73).

The Pool No. 2 or 4/4 Account is shown, by the testimony of Mr. Fiske, to be a firm account (p. 55). Therefore, this claim should be eliminated from the list of assets.

The two claims of *Clifford M. Washburn*, amounting to $25,892.13, should also be eliminated from the assets, as Mr. Washburn was a member of the firm of J. M. Fiske & Company and was insolvent (pp. 261, 59).

It was shown by the testimony of Mr. Fiske and Mr. Wolf, that the debts of *John Felix* (pp. 55, 56, 72), R. F. Little (pp. 57, 72), and G. T. Sullivan (pp. 58, 74), were uncollectible on January 19th, and that *Charles McLean* had a good counterclaim for salary, which would wipe out the claim against him (pp. 58, 74). By the testimony of Mr. Wolf, it was proven that nothing could be collected from *Harry E. Stevens*, and that the accounts in the name of *Sarah L. Stevens* and *Martha L. Stevens* were in fact accounts of Harry L. Stevens (p. 74).

The appellant, in its criticism of the evidence, showing these accounts were valueless as assets, loses sight of the fact, that the test is, what was their value to a going business. Clearly they had none.

The aggregate amount of these bad accounts, less the amount to be received on the Morison settlement, is $433,833.55. If this amount is deducted from $745,919.48, the face value of the assets, the assets are reduced to $312,085.93.

(4) *Claim against James R. Keene.*

The only possible asset not included in the above calculations is the claim of J. M. Fiske & Co. against James R. Keene, upon which the Trustees of J. M. Fiske & Co. were, at the time this action was tried, suing Keene.

Its value was doubtful, in that the Trustees might not recover any sum whatever thereon. The greatest amount which the Trustees could recover, if successful in the Keene litigation, was fixed. According to Mr. Wolf's testimony, the maximum amount that could be recovered in the two Keene suits was $50,000 to $90,000 (pp. 273, 274).

The appellant says that this testimony, as to the value, is of little or no value. Such, however, is not the case. Mr. Wolf, according to the testimony, had had charge of the Keene litigation in behalf of the Trustees and, by reason thereof, was familiar with the facts out of which it arose and was qualified to state, as he did, the amount that could be recovered. The maximum amount was $90,000. This testimony is uncontradicted. Adding this amount to the assets of Fiske & Co., as already set forth, the total value of the assets of the firm of Fiske & Co. on January 19th at about 12 o'clock was about $402,086.01.

The contention of appellant's counsel, at page 72

of its brief, that the damages recoverable from Keene were $171,000, is not sound. The said actions brought by the Trustees against Keene were actions to compel Keene to account for secret profits, not actions for damages. Furthermore, the 9,740 shares carried by the bankrupts were not all owned by them. Some were carried for their customers. The number of shares carried by the bankrupts is not shown. The 6,000 shares, referred to in the complaint, were the shares Fiske & Co. were liable to take, if purchased by Keene. It is not alleged or shown that this number was purchased for or held by them on January 19th under the pooling agreements. Therefore, appellant's figures are without foundation.

(5) *Summary.* To sum up the foregoing facts, the following is shown to be the condition of the firm of Fiske & Co. on January 19th at twelve o'clock, the time of the transfer:

Face value of assets		$745,919.48
Less worthless accounts included in the foregoing assets	433,833.55	
		$312,085.93
Counting as an asset the claim against Keene at its greatest possible value	90,000.00	
Greatest possible actual value of assets		$402,085.93
Liabilities		904,570.02

There can be no doubt that at 12 o'clock on January 19, 1910, the time of the transfer, the firm of Fiske & Company was irretrievably and hopelessly insolvent. Its assets were not sufficient to pay fifty per cent of its liabilities. Not only was the firm insolvent, but the individual members thereof were all insolvent. This appears from the testi-

mony of Mr. Fiske (pp. 181-184), Mr. Sherwood (pp. 212-214), Mr. Humphrey (pp. 215, 216) and by the stipulation in regard to Mr. Washburn (p. 261).

The argument that Mr. Humphrey was solvent, because his personal debts were $440.41 and personal assets $1,000, is absurd, in view of the condition of the firm. He was liable for the firm debts.

(6) *As to the Hocking Pool.*

Appellant asserts the solvency of J. M. Fiske & Company, on the ground that J. M. Fiske & Company had, on their own or others' account, 9,740 shares of the common stock of the Columbus & Hocking Coal & Iron Company (p. 172), which stock at the opening of the Stock Exchange at 10 o'clock on January 19, 1910, was quoted at 88½, broke (p. 176), and by noon dropped to 60, a depreciation in market value of 28 points a share, claiming that there is no evidence that the financial condition of the Hocking stock changed materially between the hours of 10 and 12 o'clock, and that therefore the Hocking shares held by J. M. Fiske & Company are improperly figured at 60. The fallacy lies in this, that the value around 90 was not real, *but artificially created and deceptively maintained by a pool.* The lowest price for Hocking on January 19th was 25 (p. 272). If the 9,740 shares had been offered for sale at 12 o'clock on January 19th, there can be little doubt that they would not have brought 60.

Furthermore, the value of Hocking stock to a stock brokerage firm, as a going concern, was its market value on the exchange.

The appellant also errs in assuming, that it is proven, that Fiske & Co. were solvent on the morning of January 19th. The financial condition of J. M. Fiske & Co. on the morning of January 19

was not shown at the trial. The proof was directed to their condition at about 12 o'clock, and in computing the value of the assets at that time, the prices at which the Hocking and other stocks were selling on the New York Stock Exchange were taken as the market value, which is usual. Although the Hocking stock for a week prior to January 19 sold around 88 and 90, *that was due to a pool and manipulation by experts* (pp. 272, 275). (Pooling Agreements, Deft.'s Ex. C, D, E, F, G, H, I, J, K.) It is likewise true that after the Hocking pool broke and there was no further manipulation and "support," as it is called, of the Columbus & Hocking stock, the price dropped below 60, and for two weeks after January 19th ranged between 37 and 14 (p. 272). The greater values, around 90, were a semblance created for purposes of stock manipulation.

Assuming for the purpose of this argument, that appellant's contention that the 9,740 shares of Hocking should be valued not at the Stock Exchange price of 60, but at 88½, is sound, still J. M. Fiske & Co. were undoubtedly insolvent at noon on January 19th. Because, if by a valuation of Hocking at 88½, the assets be increased to the extent of $277,590 over the $402,085.93 mentioned, that is, if the total value of the assets of J. M. Fiske & Co. at noon on the 19th be increased to $679,679.25, these assets would be insufficient where the actual liabilities were $904,570.02.

(7) *Other evidence of insolvency.*

In addition to the evidence of insolvency above referred to, we have the fact that J. M. Fiske & Co. were petitioned into bankruptcy at 3.25 P. M. on January 19th, and subsequently adjudicated to have been bankrupts at that time (pp. 398, 375-

377). The importance of this, as showing their condition at twelve o'clock, noon, on said day, lies in the fact that the bankrupts practically stopped business at twelve o'clock, the announcement of their suspension reaching the "exchange" at 12.40 (pp. 42, 379).

Furthermore, Mr. Ernst, the Receiver, testified that the assets which came into his hands, did not amount to $200,000 (pp. 126, 127, 132, 157, 158, 400, 401). The amount of the claims filed with the referee is over $1,000,000 (p. 452). The excess of liabilities over the assets received by the Receiver is so great that, even allowing for the difference between the value of the assets to the bankrupts as a going concern and their value in bankruptcy, we must conclude that the bankrupts were insolvent at twelve o'clock, noon, on January 19th.

B.

THERE IS NO MERIT TO THE APPELLANT'S CONTENTION THAT THE PAYMENT OR TRANSFER WAS NOT IN SATISFACTION OR ON ACCOUNT OF AN ANTECEDENT DEBT.

The debt of the bankrupts to the appellant was contracted at ten o'clock of the morning of January 19th. It was then that they borrowed the $400,000. This is undisputed. At that time the bank got no security, as Mr. Roe states in his testimony, at page 120:

> "Q. You gave J. M. Fiske & Company credit on your books of $400,000 at their request on that morning? A. Yes.
>
> "Q. You credited that to their account? A. Yes, I credited that to their account.
>
> "Q. And they could draw their checks against it? A. Yes.

"Q. And at the time you made that credit you had no collateral security for that loan? A. There were no securities handed in at the time the loan was made.

"Q. Then you had none? A. No."

The transfer was made at about twelve o'clock. It was to secure and apply in payment on account of an indebtedness then existing.

The extract from Judge Ward's opinion, quoted by the appellant at page 77 of its brief, "that the loan and repayment the same day should be regarded as one transaction," has reference, not to the actual transactions herein involved, but to a supposititious case, that is, to the transactions as they might have been, had the contract between the parties been such a one, as is outlined by him in the preceding part of the paragraph, from which this quotation is taken.

It is needless to discuss here, whether the situation would be different, had there been an agreement, when the loan was made, that the bankrupts were to give the bank, as security, the stocks actually transferred to the bank at twelve o'clock, for, as shown elsewhere in this brief and as found by the Special Master and both of the lower courts, there was no such agreement in this case.

C.

THE EFFECT OF THE TRANSFER TO THE APPELLANT OF THE SECURITIES AND MONEYS IN QUESTION WAS TO ENABLE IT TO OBTAIN A GREATER PERCENTAGE OF ITS DEBTS THAN OTHER CREDITORS OF THE SAME CLASS.

There can be no question but that, if the bank is permitted to retain the securities and moneys transferred to it on January 19th, it will receive a greater percentage of its debt than other general

creditors. It will receive practically full payment of its claim and the other creditors will receive but a small percentage of their claims. *This is not disputed by the appellant.*

The appellant contends, however, that it is a creditor in a class by itself, because the bankrupts did not obtain so-called "clearance" loans from any bank other than the appellant, and that, for this reason, it did not obtain a preference over others of the same class. There is, we submit, no merit to this contention.

The test of whether two creditors are in the same class within the meaning of Section 60a of the Bankruptcy Act, depends solely on whether they should be classified alike in a distribution of the estate.

> "The words 'the same class' refer to the classes created by the Bankruptcy Act itself in prescribing the order of priority in the distribution of the general estate among creditors, as, for instance, taxes are in the first class, wages of workmen, clerks and servants are in the second class, and other priorities given out of insolvent estates by the state or federal laws are in the third class, and all other creditors constitute the fourth and last class."
>
> Remington on Bankruptcy, Section 1387.
> Swarts v. The Fourth National Bank, 117 Fed. 1.

The case, last above cited, discusses the decision of Grosscup, J., in re Harpke, 116 Fed., 295, cited by appellant, and shows the absurd results that would follow such a construction of the Act.

Clearly, the claim of the appellant does not come within any of the first three classes above set forth, but falls in the fourth class with claims of all other

general creditors, whether partially secured or not. To say that the appellant, as the only bank, which made daily unsecured loans to Fiske & Co., is in a class by itself, is as absurd, as to say that the claim of a dentist or of a butcher each belongs in a separate class, where only one dentist or one butcher has filed a claim.

D.

THE INTENT OF THE DEBTOR TO GIVE A PREFERENCE WAS CLEARLY ESTABLISHED IN THE CASE AT BAR. IT IS UNNECESSARY, THEREFORE, TO DECIDE WHETHER SUCH INTENT IS A NECESSARY ELEMENT OF A VOIDABLE PREFERENCE.

It is immaterial, so far as this case is concerned, whether the rule in Alexander v. Redmond, 180 Fed., 92, or that in Hardy v. Gray, 144 Fed., 922, should be followed, to wit, whether the intent of the bankrupts is immaterial, or whether such intent must be shown, because in the case at bar such intent was clearly established.

Assuming that the intent of the bankrupts is a necessary element in the case of a voidable preference, how must such intention be proven?

The question is answered by this Court in Toof vs. Martin, 13 Wall. (U. S.), 40, at p. 48, Mr. Justice Field writing the opinion, says:

> "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of his proceeds to all his creditors, necessarily operates as a preference to him, and *must be taken as conclusive evidence that*

> *preference was intended,* unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy." (Italics ours.)

This principle was again recognized by this Court in Western Tie & Timber Co. v. Brown, 196 U. S. 502, at p. 508, where Mr. Justice White, writing the opinion, says:

> " * * * if Harrison, being insolvent, to the knowledge of the company, withi nthe prohibited period, gave the tie company authority to collect the sums due to him by the laborers for goods sold to them, with the right or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And, if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did."
>
> Citing Wilson v. The City Bank, 17 Wall. (U. S.), pp. 473, 486.

In the case cited in the opinion of Mr. Justice White, Mr. Justice Miller, writing for the Court, said (p. 486):

> "The general legal proposition is true, that where a person does a positive act, the consequences of which he knows before hand, that he must be held to intend those consequences.

So far as we have been able to find, this principle has never been departed from by this Court.

It is true, that, in some of the circuits, opinions have been written, which would seem to disagree with this principle, but, when they are analyzed, it will be found that the disagreement is more a matter of terms than of substance.

In Hardy v. Gray, 144 Fed., 922, a case arising in the First Circuit, while Mr. Justice Putnam attempts to limit the effect of Toof v. Martin, *supra,* upon the theory that the decision in that case was modified and changed by other cases cited by him on page 925, he nevertheless admits the essential principle decided in the cases above cited and for which we are contending. At the foot of page 923 he says:

> "Thus, as the statutes now stand, so far as concerns any alleged preferences involved in these appeals, all artificiality has disappeared, and the word "preference," as well as the word "intended," must be read with their natural meaning, subject, of course, to the general rules by virtue of which, under certain circumstances, an act from which a result ensues may sometimes be held to contemplate and purpose the result."

With all due deference to the learned Justice, who wrote the opinion in Hardy v. Gray, we do not think his statement at page 925 is correct, that the expressions in Toof v. Martin, which it was claimed in that case supported the position of the trustees, were more than met in the later cases of Wilson v. The City Bank, *supra;* Grant vs. National Bank, 97 U. S., 80; Barbour v. Priest, 103 U. S., 293, and Stucky v. Masonic Savings Bank, 108 U. S., 74.

Wilson v. The City Bank we have already quoted from above, and it affirms the principle laid down in Toof v. Martin, that where a person does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences. Otherwise, the case is not in point.

So far as the question of intent to prefer was concerned, the point involved was, whether the bankrupts "had procured" a seizure of their property under execution with intent to prefer, by not resisting regular judicial proceedings, in which a judgment and levy on their property were obtained in a case where a debt was due and the bankrupts were without any defense to the action. Clearly, they had done nothing to "procure" a seizure of their property. There were no facts, from which an intent to prefer by procuring a seizure could be inferred.

In Grant v. National Bank, 97 U. S., 80; Barbour v. Priest, 103 U. S., 293, and Stucky vs. Masonic Savings Bank, 108 U. S., 74, the only question before the Court, in each case, was as to whether the creditor had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. The question of the *intent of the debtor* was not considered by the Court.

It is therefore apparent that Mr. Justice Putnam was not justified in his criticism or limitation of Toof v. Martin.

Nor does the case In Re First National Bank of Louisville, 155 Fed., 100, conflict with the principle, contended for and decided by this Court in the cases above cited. This case merely holds that the intention of the debtor to prefer cannot be presumed from the mere fact, that he is insolvent, *where he is continuing his business in the usual way and making payments without a thought of disparagement of other creditors, and with confi-*

fidence of the debtor, and may well suppose that in such a case, the creditor may share in the confidence of his debtor and may well suppose that the debtor, while paying him his debt in the common course of business, is acting without any purpose of giving special favors. In other words, the facts, affirmatively established in that case by the defendants, overcome and negatived the presumption, arising out of the bankrupt's insolvency.

From the foregoing discussion, it is clear that the rule established by the court in Toof v. Martin, *supra,* that "the transfer, in any case, by a debtor of a large portion of his property while he is insolvent, to one creditor, without making provision for an equal distribution of his proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. *The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy.*" (Italics ours.)

Fiske & Co. were insolvent when they made the transfer. Under the above rule, their intent to prefer is conclusively presumed, in view of the fact that the appellant did not show any facts to overcome this presumption.

In the case at bar, it is not necessary, however, for the appellees to rest upon this presumption, arising out of the insolvency of Fiske & Co., in order to establish the debtors' intent, for the intent is affirmatively shown, by other facts, proven in this case.

On the morning of January 19th, the day upon which the transfer was made, Fiske & Co. were not in good condition, as is apparent from the number

of bad accounts and the general condition of their affairs, as described by the accountant. Their insolvency at noon, the time of the transfer, was caused, among other things, by the disturbance, that morning in the stock market and the break in Columbus & Hocking Coal & Iron stock. Their troubles had been accentuated shortly after the opening of the exchange that morning, when the market began to break, and had become serious before 12 o'clock. Not only did they know this, but it is apparent from the testimony of Mr. Roe, that, even before he left the bank to go to the office of Fiske & Co., seeking the securities, the financial troubles of Fiske & Co. had become a matter of notoriety (p. 86). It was a matter of general knowledge on his part and on the part of the clerks in the bank and upon the exchange (p. 87).

At the time of the transfer, Fiske & Co. knew that they were insolvent and that they could not continue business. Their announcement of this fact reached the exchange at 12.40 P. M. (pp. 42, 379). In addition to this, the very act of making the transfer showed their intention. They surrendered practically all the good securities held by them, thus rendering it impossible to continue business. (See Stock on Hand, pp. 382-384.)

Their intention is further evidenced by the facts and details surrounding the transfer itself, which will be hereinafter fully discussed in considering the question, as to whether or not the appellant had reasonable cause to believe a preference was intended.

E.

THE APPELLANT HAD REASONABLE CAUSE TO BELIEVE THAT IT WAS RECEIVING A PREFERENCE.

AS TO THE LAW.

We do not understand the force of the criticism, made by the appellant, of the finding of the Master, quoted on page 91 of its brief.

Eliminating, for the time being, the question of the bankrupts' intent, which has already been discussed, and dealing only with the attitude of the transferee—the principle of law laid down by the Master cannot be disputed and is admitted by the appellant on the subsequent part of its brief.

The appellant further states at page 91 of its brief:

> "We do not understand the rule prior to the amendment of the statute to have been that if A, being B's debtor, and knowing himself to be in a failing financial condition, should come to B, who was entirely ignorant of A's condition, and pay his debt, that recovery would be allowed on the ground of a preference, if A subsequently and within the statutory period fails. Yet, as we view it, this is practically what has been the result in the case at bar."

We do not contend and have never contended, that the law is as above stated, and we shall show that no such result was reached in the case at bar.

Before examining the facts, however, we shall state our understanding of the law.

We recognize, that, to determine whether or not the bank had reasonable cause to believe a preference was intended, it is necessary to examine,

whether it knew or had reasonable ground to believe that J. M. Fiske & Co. were insolvent.

In the case at bar, as already shown, the transaction was a preference and was intended by the bankrupts as a preference. The bank knew, that the result of the transfer would be to enable it to get a greater percentage of its debts than other creditors of Fiske & Co., if that firm were insolvent, for the transfer was without present consideration and enabled the bank to secure almost full payment of its claim. The question, therefore, whether the bank had reasonable cause to believe a preference was intended in this case depends entirely upon whether or not the bank at the time of the transfer had reasonable cause to believe Fiske & Co. were insolvent.

It is not necessary to show that the bank had actual knowledge, or even belief, but only reasonable cause to believe.

Pratt v. Columbia Bank, 157 Fed., 137.

A transferee has been held to have reasonable cause to believe a debtor is insolvent, if he had actual knowledge of the insolvency, or if he had actual knowledge of such facts as would convince a reasonable business man that the transferror was insolvent, or *if he had knowledge of such facts and circumstances as would induce a reasonable business man to make inquiry, which inquiry would establish insolvency, in the last event, it being held that a transferee is chargeable with knowledge of all the facts which an inquiry on his part would have disclosed.*

In re Louis A. Eggert, 102 Fed., 735.
Wager v. Hall, 16 Wall. (U. S.), 584.
Dutcher v. Wright, 94 U. S., 553.

Wright v. Wm. Skinner Mfg. Co., 162 Fed. 315.

Pratt v. Columbia Bank, 157 Fed., 137.

Schmidt v. Bank of Commerce, 25 Am. Bkpcy. Rep., 904.

McElvain v. Hardesty, 169 Fed., 31.

Alexander v. Redmond, 180 Fed., 92.

Coder v. McPherson, 152 Fed., 951.

Wright v. Sampter, 152 Fed., 196.

Stevens v. Oscar Holway Co., 156 Fed. 90.

In re Tindal, 155 Fed., 456.

Stern v. Paper, 183 Fed., 228.

In re Virginia Hardwood Mfg. Co., 139 Fed., 209.

Bardes v. First Natl. Bank, 122 Iowa, 443 (12 Am. Bkpcy. Rep., 771).

Crittenden v. Barton, 59 App. Div. (N. Y.), 555.

Huttig Mfg. Co. v. Edwards, 160 Fed. 619.

Brewster v. Goff Lumber Co., 164 Fed. 124.

In Re John J. Coffey, 19 Am. Bk. Rep., 148, 165 (not reported in Fed.).

The foregoing statement of the law is not in any sense in conflict with Grant v. The Bank, 97 U. S., 80, cited by appellant.

This is well pointed out in re: Louis A. Eggert, 102 Fed., 735:

> "The supposed conflict between these cases is imaginary, not real. In Grant v. Bank, and the cases subsequent in point of time, the Court was dealing with the facts spread upon the record, and did not find occasion to consider the facts and circumstances which, if

brought home to the creditor, would put him upon inquiry of his debtor's financial condition. In the cases antedating Grant v. Bank, the question of notice arose and was considered. The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; *that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.*"

Two of the earlier decisions referred to in the above quotation are Wager v. Hall, 16 Wall. (U. S.), 584, and Dutcher v. Wright, 94 U. S., 553, in which latter case the Court said, at page 557:

* * * "but if it appears that the debtor, giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact to be so by reasonable inquiry."

Circuit Judge Sanborn, whose opinion, in the case of Powell v. Gates City Bank, is cited by the appellant at page 93 of its brief, in writing the opinion for the Circuit Court of Appeals for the Eighth Circuit, in Coder v. McPherson, 152 Fed. Rep., 951, states at p. 953:

> "Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

See also Wright v. Wm. Skinner Mfg. Co., 162 Fed., 315.

The appellant at page 92 of its brief admits that "the rule unquestionably has been established that if a creditor accepts a transfer under circumstances which would lead a business man of ordinary prudence and sagacity to believe that he was being preferred by the debtor, without investigation, he will be charged with such knowledge of the debtor's intent as he would have acquired had he made such investigation, and in determining this fact each case must of necessity stand largely on its own feet."

The following quotation in Matter of John J. Coffey, 19 Ab. Bk. Rep., 149, at p. 165 (not reported in Fed. Rep.), expresses the established rule well and is particularly aplicable to the case at bar, as will appear when the facts are hereinafter discussed:

> "A debtor's fear about his credit should put a pressing creditor upon inquiry as to the situation of it and the necessity for it. He cannot neglect to investigate, be intent on security, and purposely ignorant and blind, or intend to be, of his circumstances, until after

he gets the security, and escape being held to have had reason to believe what the effect of the giving of it will be, which, under the Act of 1898, if enabling him to get more than other creditors, is an intended preference under Sections 60-a and 60-b, as was held in Benedict v. Deschel, *supra.*"

Furthermore, we must judge the transaction not only by what it was proved the transferee knew as to the insolvency, but we must take into consideration and can infer a belief that a preference was intended from unusual actions and methods on the part of the transferee in relation to the Bankruptcy Act.

Hanly vs. Gray, 144 Fed., 922.
McElvain v. Hardesty, 169 Fed., 31.

AS TO THE FACTS.

In the case at bar we contend that the evidence clearly establishes, not only that the cashier of the appellant bank had reasonable ground to believe a preference was intended, but that he affirmatively sought a preference; it further shows, not only that, when the transfer was made, he had knowledge of facts and circumstances, such as would have induced a reasonable person to make inquiries, which would have disclosed insolvency, but *he had then made up his mind and believed the firm to be insolvent.* His actions disclosed his knowledge and belief most eloquently and convincingly and are absolutely inconsistent with ignorance of insolvency.

The proof upon this point lies within a narrow compass. It is largely dependent upon the testimony of the cashier of the bank, an interested and adverse witness, and is as follows:

After the bank, on the morning of the 19th of

January, 1910, made the unsecured loan of $400,000 to J. M. Fiske & Co. upon their written request, there was a disturbance on the Stock Exchange; that is, there was a sudden change in the values of certain stocks in which J. M. Fiske & Co. were large dealers, and it became rumored around the "street" and in financial circles, that J. M. Fiske & Co. were "in financial trouble" (pp. 85-87). This reached the bank, and one of the clerks in the Receiving Teller's department, about twelve o'clock, informed the cashier of such rumors (pp. 85, 87, 92).

The Cashier must already have known the condition of the market, for he had a ticker in the office, and stated in his testimony that he knew there was a disturbance in the market that morning (p. 86). What occurred, when he was told of the rumors in regard to J. M. Fiske & Co. by the clerk, we can only gather from his own testimony, and, of course, we can hardly expect this Cashier, knowing his bank to be in danger of losing a large sum of money, if the taking of such property should be declared a voidable preference, to have a very good memory, as to what occurred between himself and the clerk, or as to the details of the conversation, which he states he had with Mr. Knowles, the Vice-President. The most he would admit was that he had reason to believe that the firm, who had that morning received a credit of $400,000, and who had not up to that time (about noon) made any deposit or sent in any securities of money, *was in financial trouble* (pp. 85-87).

When he learned this, however, did he, as would any ordinary prudent business man, investigate or make inquiry as to the condition of J. M. Fiske & Co.? Had he done so, he would quickly have learned that the firm was deeply interested in Columbus & Hocking Coal & Iron stock, and that, because of

the enormous decline in the price of that stock, the firm was hopelessly insolvent. He knew enough. He evidently *knew what financial trouble* meant to a Stock Exchange house, and especially to this Stock Exchange house. He merely looked to see how much Fiske & Co. owed his bank. He found that their checks to the amount of $276,000 had been certified that morning, and no deposits had been made. That was enough investigation for him (pp. 89, 87-89). He did not care to know whether Fisk & Co. owed others, or if they could pay others. His only thought was to stop further certification and payment of checks, and to get security or money for the bank quickly.

Yet, what was the necessity for haste, unless he were seeking to get ahead of other creditors? He knew that, if J. M. Fiske & Co. were solvent, the bank's loan would be paid before 3 o'clock of that day. That was the understanding and the custom. They had never before failed to pay a loan of this kind during the day, and in the elaborate alleged custom, testified to by the cashier and the officers of other banks called by the defendant, there is no provision for such an occurrence (p. 88). *No solvent stock brokerage firm ever fails to meet its obligations to a bank.* If J. M. Fiske & Co. were solvent, there was no cause for alarm, and no need of haste, for the loan would be paid by them that day. It is true they had not yet made any deposits against their withdrawals, although they generally did so before 12 o'clock, but there was nothing in this to cause alarm. If we may judge from the testimony of Mr. Carse, Vice-President of the Hanover National Bank, who was called by the defendant to testify as to the alleged custom, it was not unusual for deposits to come in sometimes as late as 2 or 3 o'clock (p. 220). Mr. Carse and the cashier of the appellant both testified that the usual

custom, if deposits were late, was to telephone the customer (pp. 220, 117).

Why didn't the cashier telephone Fiske & Co. to make a deposit? Evidently he believed that this was an extreme case. So he departed from what he had thus claimed to be the usual and established custom, and, without notifying J. M. Fiske & Co., took the extreme step of stopping at once all business with the firm absolutely.

Is it possible that he would, without a word to J. M. Fiske & Co., have taken this drastic move, which he knew meant instant and absolute ruin to their credit throughout the "Street," knowing that at any moment checks drawn by them would be presented for payment or certification and dishonored, unless he felt pretty confident that the condition of the firm was hopeless, and unless he was dominated by an overpowering desire to save the bank from loss?

We contend that this act of stopping payment and further certification of the firm's checks by the bank, after a hasty consultation between the witness and the Vice-President, speaks eloquently of what they both thought and knew of the situation.

Banks are conservative institutions; having given the firm credit of $400,000 that very morning, according to a daily custom which had continued for years, is it credible that, on that very same day, without waiting for the repayment of the loan, due on the afternoon of that very day, that without the most solid and substantial reasons that seemed to be both good and sufficient, they would thus cut off further honoring or certifying of the firm's checks, and that, too, without giving the firm a chance to make good? A bank, simply in doubt as to a firm's condition, would at least telephone the firm that, unless they sent over

moneys or securities within five or ten minutes, they would stop further payment and further certification of the checks, and they could easily delay certification for that short interval. Nothing of the kind here. The officers had heard enough. There is no other reasonable explanation; there is no other possible explanation of that radical act on the part of the bank, except that its officers were both satisfied from what they had heard that morning that the firm, in the parlance of the "Street," was already "busted."

Having thus stopped the account of J. M. Fiske & Co., the cashier dropped everything else, and with all possible haste, raced around to the firm's office at 42 Broadway, although he had never done such a thing in all the years the firm had been a depositor of the bank (pp. 82-91). When he reached the office, he saw Mr. Sherwood, a member of the firm (pp. 92-99). We can easily imagine what occurred at this interview, although Roe is again most secretive and his memory again faulty. He cannot tell us what actually happened there upon this extraordinary occasion, but he finally admits that he told Sherwood that he had heard that Fiske & Co. were in "financial trouble," and that Sherwood made an "evasive reply" (p. 94). Even this is a startling admission. Here was the cashier of the bank from which Fiske & Co., if they were to continue business, needed further credit, alarmed at the firm's financial condition, asking if the rumor as to the firm's financial embarrassment were true? Were Fiske & Co. solvent, Sherwood would not only have said so most emphatically, but would have gone to any trouble or expense to convince the bank of the fact. *He knew and the cashier knew that an "evasive answer" under these circumstances was confession. It was as definite and effective as sending the bank a written notice that the firm was bank-*

rupt. It was impossible for the cashier to mistake the meaning of such a reply.

The balance of the conversation with Sherwood was that there were deposits on the way to the bank, but the cashier had evidently lost all confidence in the firm of J. M. Fiske & Co., for he did not inquire the amount of the deposits, but insisted on having securities. Can this possibly be consistent with the idea that he did not know the firm was "through," especially when, as testified to by Messrs. Carse, Vice-President of the Hanover National Bank, and Alexander, Vice-President of the National Bank of Commerce, it was not customary for banks, in cases of loans of this character, to accept security or have further loans forced upon them, but to insist on payment of the loan in money (pp. 221, 240). He did not care what was customary, but wanted security—as much security as he could get—and he wanted it in a hurry. *He did not ask, if they were securities that had been taken up with the money borrowed that day from the bank.* He did not claim them under any contract or custom. He even took some securities upon which the bank could by no possibility claim a lien. He did not even take time to examine them, just glanced over them, put them in his pocket and hurried away without examining them, making a list of them, or giving a receipt (pp. 98, 99). Does this look like an ordinary business transaction? Is it the conduct of a man, who is merely a little uneasy, as to his debtor's condition? Certainly, it is most unusual, and it is only consistent with the idea that he felt convinced and knew that J. M. Fiske & Co. were insolvent and that he was willing to take everything and anything he could get for the bank. He felt that it would, at least, be so much saved the bank. He would be so much ahead of other creditors.

The unusual procedure in this case is in itself sufficient to raise the inference that a preference was intended, and brings this case within the rule stated by Remington on Bankruptcy, Sec. 1399, p. 827, that:

> "The resort to unusual method of payment or securing of payment will raise an inference of belief that a preference was intended."

See also

In re Andrews (135 Fed., 599).
McElvain v. Hardesty (169 Fed., 31).

That the appellant actually knew of the insolvency of J. M. Fiske & Co. becomes even clearer, when the case is viewed in the light of the cashier's further conduct.

On his return to the bank, he found that the deposit, that Mr. Sherwood stated was on the way around, had arrived, and amounted to $54,048.18. He had brought with him a large quantity of securities, which he had obtained without difficulty, and he had talked with Mr. Sherwood, a member of the firm, yet in spite of these facts, he was evidently not convinced that the firm was in a satisfactory financial condition, and in no danger of failure, for without waiting to have the securities listed, or knowing just what they were or their value, *he continued the instructions to his employees not to honor any more of the firm's checks, and ordered that the account be balanced.*

This action must convince us that he knew the firm was insolvent and would suspend business, for it is inconsistent with mere suspicion or doubt on the part of the bank.

Assuming, that the bank had been in doubt and had heard rumors and was simply uneasy, and be-

cause of this alone had taken the great responsibility of stopping further checks, what would have been its first step, when it found itself so much better off with the account than it was at the time payment was stopped? Three things had since happened: (1) a $54,000 deposit had been made; (2) the cashier had spoken with Mr. Sherwood, a member of the firm; (3) the cashier had obtained over $175,000 worth of securities. In other words, everything had happened to allay the bank's fears, were it uneasy. The duty of the bank if it did not believe the firm was insolvent was to restore its credit, which it had cut off so impulsively and without proper foundation.

Its first step would have been to restore payments of checks and certifications. It would have realized, that it had made a great mistake, which might prove disastrous to the firm, and it would not have lost a minute in rehabilitating the firm. Did it do anything like this? Not at all. It put the last nail in the coffin of the firm's credit by closing the account up entirely and forever. This last act of closing the account, viewed in connection with the stopping of payment, leads to the irresistible conclusion that the bank's officers knew thoroughly well what they were about, and that, when they received the securities and moneys and closed the bank "lid" on the firm of J. M. Fiske & Co., they knew the firm was "done."

That the action was justified is evident from the fact that at 12:40 of that day, the firm suspended.

The appellant contends that even though the bank, at the time it received the securities, had reasonable cause to believe a preference was intended, that this is not true of the sum of $54,048.18, which was received in money. There is, however, no distinction between the moneys and the securities, for the moneys did not arrive at the bank

until after the cashier had the conversation with Mr. Sherwood above set forth (p. 110), and until after the bank had knowledge of the facts, which, as already shown, must have convinced it that the firm of J. M. Fiske & Co. was solvent (pp. 312-13).

Under the foregoing facts and circumstances, there can be no doubt, that the appellees have proved absolutely that, when the bank received the securities and moneys in question, it had reasonable cause to believe that preference was intended, and, therefore, the transfer of the said moneys and securities to it constitute a voidable preference within the meaning of the Bankruptcy Act.

F.

There is no merit to the appellant's contention that the estate of Fiske & Co. was not diminished by the transaction and that therefore the transfer was not a preference.

The transfer herein did diminish the estate to the extent of more than $230,000, the value of the property transferred.

The case of Continental Trust Company vs. Chicago Title Company, 229 U. S., 435, has no application to the case at bar, as the facts herein show that the bank was a creditor of the bankrupts on the 19th of January, 1910, for money loaned to them, and, on that day, it received securities to which it was not entitled under any agreement, as collateral security for the debt, and to that extent the bankrupts' estate was certainly diminished.

In the Continental Trust Company case, *supra*, Mr. Justice Day clearly points out that had it not been for the co-operation of Anderson & Company, who took the place of Prince on the Board of Trade, substituting their securities for his and carrying out his obligations, the certificates would have had no value to the estate. It was only by the arrange-

ment made with Anderson & Company and their carrying out the deals of Prince that the certificates were cleared of any obligation to others and became payable to Prince. This being so, the Court very naturally held, that, what was done, did not in fact diminish the estate of Prince, otherwise available to creditors, for, if Anderson & Company had not taken Prince's place and carried out his deals, the traders holding the certificates would have had the benefit of the deposits. What was therefore done by Anderson & Company in no way diminished the estate of the bankrupt, and because it worked to the benefit of a creditor (the bank) was not sufficient to make it a preference, unless the estate of the bankrupt was thereby diminished.

The bank, in that case, clearly had the right of set-off, unless a violation of Section 68B was shown, and, inasmuch as the bank had not acquired any claim against the bankrupt with a view of setting it off on the certificates, but what was really done was the satisfaction, without diminution of the estate of the bankrupt, of possible claims of others, who, in the event of the bankrupt's default, would have been entitled to the deposits represented by the certificates, the bank was not deprived of its right of set-off. The learned Justice further indicated the position of the Court by saying, in summing up the situation:

> "What was done here, as we have said, consisted in procuring a broker to take up the trades of Prince, so that the certificates became clear of the rights of any third persons, and to do this without any diminution of the bankrupt estate."

The appellant, in seeking to apply the Continental Trust Company case to the case at bar, assumes

the existence of an agreement or custom, which we have hereinbefore shown does not exist. It also loses sight of the fact that in this case Fiske & Co. were in good credit when the loan was made by the bank. Had the bank not made the loan, Fiske & Co. could have secured it elsewhere.

In the case at bar, although the loan and the transfer were made on the same day, they were separate transactions just as distinct as if made a month apart. If the appellant's contention were correction, there never could be a preference if the money borrowed was used in the business of the bankrupts. If a person made a loan to a business man, and subsequently and within the statutory period and when he knew the man was insolvent, took security to the amount of the loan, the net result of the transaction would not have diminished the bankrupt estate any more than in the case at bar, yet the transfer would be a voidable preference.

The correct test is, Did the transfer diminish the estate? The estate, herein, was diminished by the transfer to the extent of more than $230,000.

POINT V.

The appellant has no right to set off the sum of $54,048.18, delivered to it by Fiske & Co., but the delivery of the said sum to the appellant constituted a preferential transfer which is voidable by the trustee.

The appellant has no right of set-off in regard to the sum of $54,048.18, transferred to it by the bankrupts, because the said sum was never received from Fiske & Co. or accepted by the bank as a deposit. The said sum was received by the bank after Mr. Roe, the Cashier thereof, had directed the Certification Clerk and the Paying Teller not to certify or pay any more checks drawn by Fiske & Co. He had closed the account and had gone to the office of Fiske & Co. to obtain some security for the amount owing by that firm to the bank. While he was there, the said sum of $54,048.18 was received. This was about noon on January 19th. It was immediately applied by the bank as a payment of a portion of the indebtedness of Fiske & Co.

It never constituted a deposit. As the account of Fiske & Co. had been closed prior to its receipt, there never was a moment when Fiske & Co. had a right to draw checks against the said sum. Therefore, the relation of debtor and creditor was never created by the receipt of this money by the bank. It was treated by the parties as, and constituted a payment, and, being made under the same circumstances as those under which the securities were delivered, constituted a voidable preference.

Schmidt v. *Bank of Commerce,* 25 Am. Bkpcy. R., 904.

Ridge Ave. Bank v. *Studheim,* 145 Fed., 798.

The cases cited by the appellant in its brief do not apply, because they all deal with the right of a bank to set off sums received as deposits against which the debtor, for a time at least, had the right to draw checks.

As already pointed out, the case at bar is entirely different, as the $54,000 was received as a payment. There was no longer any account to deposit in. The bank immediately reduced it into its own possession and applied it in liquidation of the debt of Fiske & Co. It was a payment.

POINT VI.

There was no error in the admission in evidence of the books of J. M. Fiske & Co.

The contention of the appellant, that the books of Fiske & Co. were improperly admitted, is ably disposed of by *Judge Hand* in his opinion herein (p. 348):

> "The exception to the admissibility of the books is not good. They were not put in evidence to prove the sale and delivery of any securities represented by any item contained in them, or the loan of any money, but to show whether the bankrupts were solvent or insolvent at a given time. If they were not admissible for that purpose, no one could be proved insolvent without proving separately every item of liability and every asset by common law proof. The law requires nothing of the sort, but allows anyone's books in evidence, even if not a privy, to show whether he is insolvent or solvent, upon proof that they are in fact his books, duly kept in his business, for the purpose of showing his financial condition, *Adams* v. *Bowerman*, 109 N. Y., 23. The authorities cited by the defendant are all cases where the effort was to use the books to show that an item therein contained in fact represented some transaction which was the basis of the action."

See also:

In re Docker-Foster Co., 123 Fed., 190; 28 Am. Bk. Rep., 867.

Hackney v. *Hargreaves Bros.*, 13 Am. Bk.

Rep., 164, 169 (not reported in Federal Reporter).

White v *Benjamin*, 150 N. Y., 258.

Furthermore, in the case at bar it was affirmatively shown that the books, offered in evidence, were correctly kept and showed the true financial condition of the firm.

Mr. Humphrey, one of the members of the bankrupt firm, who kept some of the books and supervised the entries in all of the books, testified that the books were correctly kept, that he went over the trial balances and checked them up, and that the assets and liabilities of the firm at 12 o'clock on January 19th, 1910, could be computed from the books (pp. 32, 33, 36-38).

Mr. Fiske, another member of the firm, who made some entries in the books, also testified (pp. 68-70), and the bookkeeper, Mr. Isaacs, identified the books and testified to their correctness (pp. 139-141).

Mr. Isaacs personally kept the ledger from which Mr. Moss, the accountant, made his computation.

Mr. Moss also stated (pp. 44-45) that he verified the correctness of the books.

In consideration of this question, it must also be remembered that the proof of the insolvency does not depend alone upon the testimony of Mr. Moss, but that, as heretofore stated, Fiske & Co. practically stopped business at the time the transfer was made at the bank. Their notification of this fact reached the stock exchange at 12.40 P. M., and the petition in bankruptcy was filed at 3.25 P. M. We also have Mr. Ernst's testimony as to the assets which came into his hands, which did not exceed $200,000 in value.

POINT VII.

The decree appealed from should be affirmed with costs.

DANIEL P. HAYS,
Solicitor for Appellees.

DANIEL P. HAYS,
EDWIN D. HAYS,
Of Counsel.

MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK *v.* ERNST ET AL., AS TRUSTEES IN BANKRUPTCY OF HUMPHREY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 446. Argued October 20, 1913.—Decided November 3, 1913.

National City Bank v. *Hotchkiss*, *ante*, p. 50, followed to effect that the delivery by the bankrupt of securities to a bank to secure a clearance loan constituted an illegal preference.

This court approves the findings of the court below that the bank knew of the impending bankruptcy when it demanded and accepted security for an existing loan.

An unusual proceeding in the banking business, such as an officer leaving the bank and going to the customer's office and demanding additional security for a loan made earlier the same day, indicates knowledge of the impending bankruptcy of such customer.

A general promise to give security on demand puts the creditor in no better position than an agreement to pay money and does not justify a delivery of securities after knowledge of impending bankruptcy. It is an illegal preference.

A deposit made after the bank's officers have forbidden payment of checks against the bankrupt's deposit account is a payment and a preference and a set-off cannot be allowed.

200 Fed. Rep. 295, affirmed.

THE facts, which involve the determination of the question of whether the delivery of securities by a broker immediately preceding his bankruptcy to a bank to secure its loan was an illegal preference, are stated in the opinion.

Mr. Lewis H. Freedman, with whom *Mr. Adrian H. Larkin* and *Mr. Leland B. Garretson* were on the brief, for appellant:

Under the agreement when the loan was made, as amplified and modified by the general custom, appellant acquired an equitable lien upon, or right in or to, the money constituting the "day" or "clearance" loan and in or to all securities or proceeds of whatever nature realized, cleared or obtained possession of by the bankrupt Fiske & Co. by the use of such loan in so far as such securities or proceeds were or could be identified as so realized, cleared or reduced to possession.

"A general custom is the common law itself, or a part of it." Written contracts, by implication, incorporate custom into them. *Underwood* v. *Greenwich Ins. Co.*, 161 N. Y. 413, 423; *Newhall* v. *Appleton*, 114 N. Y. 140; *Walls* v. *Bailey*, 49 N. Y. 464; *Botany Works* v. *Wendt*, 22 Misc. Rep. 156; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Robinson* v. *United States*, 13 Wall. 363; *Hazard* v. *New England Ins. Co.*, 8 Pet. 557; *Hartshorne* v. *Union Ins. Co.*, 36 N. Y. 172.

There was an equitable lien, and equity regards as done that which ought to be done. Pom. Eq. Jur., 3d ed., § 1235; *Walker* v. *Brown*, 165 U. S. 654, 664; *Goodnough Co.* v. *Galloway*, 156 Fed. Rep. 504, 510; *Howard* v. *Delgado*, 121 Fed. Rep. 26, 30; *Chattanooga Bank* v. *Rome Iron Co.*, 102 Fed. Rep. 755, 758; *Ingersoll* v. *Coram*, 211 U. S. 335, 368; *Hovey* v. *Elliott*, 118 N. Y. 124; *Holroyd* v. *Marshall*, 10 H. L. C. 191.

One may by express agreement create a charge or claim in the nature of a lien on property of which he is the owner or possessor, and equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulations. *Ketchum* v. *St. Louis*, 101 U. S. 306; *Hauslet* v. *Harrison*, 105 U. S. 401; *Carr* v. *Hamilton*, 129 U. S. 252; *Fourth Street Bk.* v. *Yardley*, 165 U. S. 634; *Walker* v. *Brown*, 165 U. S. 654;

Ingersoll v. *Coram*, 211 U. S. 335; *Hurley* v. *Atchison &c. Ry. Co.*, 213 U. S. 126; *Sexton* v. *Kessler*, 225 U. S. 90; *Dressel* v. *Lumber Co.*, 119 Fed. Rep. 531; *First National Bank* v. *Penn. Trust Co.*, 124 Fed. Rep. 968; *Fisher* v. *Zollinger*, 149 Fed. Rep. 54; *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510; *Mills* v. *Virginia-Carolina Co.*, 164 Fed. Rep. 168; *Re Farmers Supply Co.*, 170 Fed. Rep. 502; *Goodnough Co.* v. *Galloway*, 171 Fed. Rep. 940; *Re National Cash Register Co.*, 174 Fed. Rep. 579.

If such a contract is shown to exist payments made in pursuance thereof will not be invalidated as preferences by the operation of the Bankruptcy Act. *Humphrey* v. *Tatman*, 198 U. S. 91; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Re Perlhefter*, 177 Fed. Rep. 299, 303.

The agreement creating the lien may be either verbal or in writing. *Riddle* v. *Hudgins*, 58 Fed. Rep. 490; *National Bank* v. *Rogers*, 166 N. Y. 380; *Hamilton Trust Co.* v. *Clemes*, 163 N. Y. 423; *Am. Sugar Co.* v. *Fancher*, 145 N. Y. 552; *Hovey* v. *Elliott*, 118 N. Y. 124; *Coats* v. *Donnell*, 94 N. Y. 168; *Spring* v. *Short*, 90 N. Y. 538; *Husted* v. *Ingraham*, 75 N. Y. 251; *Payne* v. *Wilton*, 74 N. Y. 348; *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Parshall* v. *Eggert*, 54 N. Y. 18; *Rochester Bank* v. *Jones*, 4 N. Y. 497.

Sexton v. *Kessler*, 225 U. S. 90, governs this case.

Appellee was entitled to set off the fifty-four thousand dollar deposit.

The moment the checks composing that deposit were received by appellant and passed to the credit of the brokers the funds became appellant's property and the relation of debtor and creditor was created and the right of set-off established. *New York County Bank* v. *Massey*, 192 U. S. 138; *National Bank* v. *Burkhart*, 100 U. S. 686; *Cassidy* v. *Uhlman*, 170 N. Y. 505, 515; *Joyce* v. *Auten*, 179 U. S. 591; *Scott* v. *Armstrong*, 146 U. S. 499; *Straus* v. *T. N. Bank*, 122 N. Y. 379.

The case involves no question of actual fraud and

appellees failed to establish by a preponderance of evidence that appellant received a voidable preference.

The burden is on the trustee to prove by a preponderance of evidence every element necessary to constitute a preference. *Barbour* v. *Priest*, 103 U. S. 293; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; *In re Leech*, 171 Fed. Rep. 622. The insolvent's estate must have been diminished as a result of the transaction. *Coder* v. *Arts*, 213 U. S. 223; aff'g 152 Fed. Rep. 949; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Calhoun Bank* v. *Cain*, 152 Fed. Rep. 983; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *In re Neill-Pinckney Co.*, 170 Fed. Rep. 481; *Sparks* v. *Marsh*, 177 Fed. Rep. 739; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; Remington on Bank., §§ 1276 *et seq.*; Collier on Bank. (9th ed.), 790–791.

The debtor must have been insolvent within the meaning of the statute, and insolvency in that sense has a different meaning from that ordinarily understood, namely, an inability to meet maturing obligations. *Pirie* v. *Chicago Title Co.*, 182 U. S. 438, 451; *McDonald* v. *Clear-Water Short Line*, 164 Fed. Rep. 1007; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Re Klein*, 197 Fed. Rep. 241; *Butler Paper Co.* v. *Goembel*, 143 Fed. Rep. 295; Remington, § 1343; Collier (9th ed.), 8.

The payment must have been in satisfaction of or on account of an antecedent debt. *Coder* v. *Arts*, 152 Fed. Rep. 943; *S. C.*, 213 U. S. 223.

Payment within four months of the filing of the petition must be established, and insolvency as defined by the statute must have existed at the time when the payment was made. *Tumlin* v. *Bryan*, 165 Fed. Rep. 166, 168; *Rutland County Bank* v. *Graves*, 156 Fed. Rep. 168; *Butler Paper Co.* v. *Goembel*, 143 Fed. Rep. 295; *In re Rome Planing Co.*, 96 Fed. Rep. 812; *Troy Wagon Works* v. *Vastbinder*, 130 Fed. Rep. 232, 234.

The inhibition of the statute applies only to preferences given when the debtor is insolvent in fact, and a lien per-

fected before such insolvency is not affected. *In re Wittenberg Veneer Co.*, 108 Fed. Rep. 593; aff'd *sub nom. McDonald* v. *Daskam*, 116 Fed. Rep. 276.

Where quotations vary enormously in a few moments, as in "panicky" times, the law will recognize the fraction of a day and the rule that the law takes no notice of the fraction of a day is inapplicable. *Upson* v. *Mount Morris Bank*, 103 N. Y. App. Div. 367.

The adjudication of bankruptcy did not relate back to the filing of the petition and is not evidence of insolvency prior to such filing. *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *In re Chappell*, 113 Fed. Rep. 545; *In re Alexander*, 102 Fed. Rep. 464; *In re Rome Planing Co.*, 96 Fed. Rep. 812.

The payment did not enable the bank to obtain a greater percentage of its claims than any other creditor of the same class.

There being no other creditor of this class there could be no violation of the statute. *Swarts* v. *Fourth National Bank*, 117 Fed. Rep. 1; *Crooks* v. *People's Bank*, 46 N. Y. App. Div. 335.

The debtor making such payment must have intended to give such a preference. *Alexander* v. *Redmond*, 180 Fed. Rep. 92; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295; *In re Leech*, 171 Fed. Rep. 622; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166; *Debus* v. *Yates*, 193 Fed. Rep. 427.

Silence as to one's financial condition cannot be construed as an admission of insolvency. *Wilson* v. *City Bank*, 17 Wall. 473; *Re Jackson Mfg. Co.*, Fed. Cas. No. 7153; *Sawyer* v. *Turpin*, 91 U. S. 114; *Clark* v. *Iselin*, 21 Wall. 360; *Watson* v. *Taylor*, 21 Wall. 378; *Cook* v. *Tullis*, 18 Wall. 322; Remington on Bank., § 1829.

The creditor receiving the payment must have knowledge or have had reasonable cause to believe he was receiving a preference. *Collett* v. *Bronx Nat'l Bk.*, 200 Fed. Rep. 111; *Re Klein*, 197 Fed. Rep. 2[illegible], *Re The Leader*,

190 Fed. Rep. 624; *Re Pfaffinger*, 154 Fed. Rep. 523; Collier on Bank. (9th ed.), 816.

Mere suspicion of insolvency is not sufficient to satisfy the statutory requirement. *Grant* v. *National Bank*, 97 U. S. 80; *Powell* v. *Gates City Bank*, 178 Fed. Rep. 609. See, also, *Stucky* v. *Masonic S. Bank*, 108 U. S. 74; *Barbour* v. *Priest*, 103 U. S. 293; *Sparks* v. *Marsh*, 177 Fed. Rep. 739; *First National Bank* v. *Abbott*, 165 Fed. Rep. 852; *In re Pfaffinger*, 154 Fed. Rep. 523; *Off* v. *Hakes*, 142 Fed. Rep. 364; *In re Eggert*, 102 Fed. Rep. 735.

The insolvent's estate was not diminished as a result of the transaction. *N. Y. County Bank* v. *Massey*, 192 U. S. 138, 147; *Continental Trust Co.* v. *Chicago Title Co.*, 229 U. S. 435; *Newport Bank* v. *Herkimer Bank*, 225 U. S. 178; *Wild* v. *Provident Trust Co.*, 214 U. S. 292; *Jaquith* v. *Alden*, 189 U. S. 78; *In re Sagor*, 121 Fed. Rep. 658; *Gans* v. *Ellison*, 114 Fed. Rep. 734; *Dressel* v. *North State Lumber Co.*, 107 Fed. Rep. 225; Remington on Bank., § 1296; Collier on Bank. (9th ed.), 802.

Appellees as trustees in bankruptcy acquired no greater rights than had the bankrupts. *Zartman* v. *First Nat'l Bank*, 216 U. S. 134, 138; *Hurley* v. *Atchison &c. Ry. Co.*, 213 U. S. 126; *Thomas* v. *Taggart*, 209 U. S. 385; *Richardson* v. *Shaw*, 209 U. S. 365; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Thompson* v. *Fairbanks*, 196 U. S. 516.

Mr. Daniel P. Hays, with whom *Mr. Edwin D. Hays* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals reached upon the same opinion that disposed of *The National City Bank* v. *Hotchkiss*, just decided, *ante*, p. 50. (The judgment of the District Court will be found

in 200 Fed. Rep. 295.) This case arose at the same time and differs but little from that in its facts, as to which, as in the other case, the master, the District Court and the Circuit Court of Appeals all agree.

The advance in this case was made at about ten on the following note to the firm signing it "Please loan us today $400000. Crediting this amount to our account and oblige. J. M. Fiske & Company." This sum was credited on the firm's deposit account, on which there was already $36,239.47. Before noon the bank certified and afterwards paid checks for $276,679.67. Between 11 and 12 the cashier, hearing that there was trouble in the stock market and with J. M. Fiske & Co., ordered that no more checks should be paid or certified. He then went to the brokers' office; saw Mr. Sherwood, a member of the firm, at about twelve and after getting an evasive answer to an inquiry as to the rumor, said that the firm had made no deposits on that day, and was told that one was on its way. ($54,048.08 were in fact paid in after the cashier's order to stop payment.) He then told Mr. Sherwood that he had better give him some securities, that he ought to give additional securities on the bank's loans, and after consultation Mr. Sherwood did so and the cashier returned to the bank. We may assume for purposes of decision that the securities with a small exception were obtained by the use of the clearance loan.

At forty minutes after twelve the brokers gave notice to the stock exchange that they were unable to meet their obligations and an involuntary petition in bankruptcy was filed against them at twenty-five minutes past three. This suit is for the proceeds of the securities, (which were sold by the bank), and for the sum deposited as we have stated. In view of our decision in the other case only one or two matters need mention. It is somewhat more pressed that the bank had not reasonable ground to believe that the brokers' property at a fair valuation would be in-

sufficient to pay their debts, and therefore had not ground to believe that the brokers were insolvent within the meaning of the Bankruptcy Act of July 1, 1898, c. 541, § 1 (15), 30 Stat. 544. We think it too plain to need argument that the findings below that the firm was insolvent, knew that it was insolvent and intended a preference, were correct. These brokers were ruined by the collapse of the pool mentioned in the other case, and apart from any knowledge that the bank may have had as to their interest in the stock concerned, the entirely unusual course of the cashier in leaving his bank to get additional security (not merely proceeds of the clearance loan upon a claim of lien) and the circumstances are sufficient to prevent our going behind the findings below. Really no other conclusion could have been reached.

On the question of lien the evidence does not differ enough from that in the other case to need further discussion. The bankrupts were under an agreement with the bank, of the usual sort, giving the bank a general lien on all securities in its hands for all liabilities of the firm and a right to require additional approved securities to be lodged with it, &c. But a general promise to give security on demand puts the creditor in no better position than an agreement to pay money. *Sexton* v. *Kessler*, 225 U. S. 90, 98.

The so-called deposit of $54,048.08 was paid in after the cashier had forbidden the payment of checks against the deposit account and therefore rightly was held to be a payment and a preference. A set-off properly was denied.

Decree affirmed.